Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-603

ALABAMA POWER COMPANY,
GEORGIA POWER COMPANY,
GULF POWER COMPANY and
MISSISSIPPI POWER COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, as Administrator,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

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NO.

ALABAMA POWER COMPANY,
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v.

ENVIRONMENTAL PROTECTION AGENCY and
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not officially reported, appears in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) acted beyond the scope of its authority under the Clean Air Act of 1970 (the Act) in promulgating regulations for the prevention of significant air quality deterioration?

2. Assuming the Act requires the prevention of significant air quality deterioration, whether the EPA regulations for prevention of significant air quality deterioration should be set aside as unauthorized under the Act when:

(a) the regulations establish arbitrary air quality increments with no rational basis and which are unrelated to known or quantifiable adverse effects on public health and welfare; and

(b) the regulations grant effective control to the Federal government over the classification of Federal and Indian lands and adjacent state and local lands and thereby abrogate the authority granted to the states under the Act.

3. Assuming the EPA regulations for prevention of significant air quality deterioration are otherwise lawful, whether these regulations are unconstitutional when:

(a) the Act does not set forth any meaningful standard for EPA to establish regulations for prevention of significant air quality deterioration and thus the regulations result from an unlawful delegation of legislative power in violation of Article I, Section I of the U. S. Constitution; and

(b) the regulations grant unrestricted control to the Federal government over state and local land uses and policies and thereby deprive the states of their powers reserved under the Tenth Amendment to the U. S. Constitution.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 1857, et seq. and the EPA regulations entitled "Prevention of Significant Air Quality Deterioration", 40 C.F.R. §§ 52.01 (d) and (f), 52.21, appear in Appendices B and C hereto.

STATEMENT OF THE CASE

This case involves the review of the action of EPA, respondent herein, in issuing regulations entitled "Prevention of Significant Air Quality Deterioration", pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 1857, et seq. (the Act), which disapprove of state implementation plans adopted under the Act to the extent that such plans lack regulations for prevention of significant deterioration of air quality and promulgate revisions to such plans for portions of those states where air quality is better than the national primary and secondary air standards.

A. *History of the Regulations*

Pursuant to the Act, EPA established national primary and secondary ambient air quality standards for each air pollutant deemed to have an adverse effect on public health and welfare and for which air quality criteria were issued.[1]

[1]Section 108 (a) (2) of the Act, 42 U.S.C. § 1857c-3 (a) (2), provides that the Administrator must issue air quality criteria for each air pollutant which "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air in varying quantities." Section 109 (a), 42 U.S.C. § 1857c-4 (a),

The primary air quality standards established pursuant to Section 109 of the Act are those standards which, allowing an adequate margin of safety, are requisite to protect the public health, and secondary standards are those which are requisite to protect the public welfare from any known or anticipated adverse effects of the specified air pollutants. Following the promulgation of these standards in 1971[2] and pursuant to Section 110 of the Act, each state promulgated a plan to implement, maintain and enforce the national standards and submitted such plan to EPA for approval. EPA initially approved all state implementation plans which complied with the eight requirements set forth in Section 110 (a) (2) of the Act.[3]

Thereafter, the Sierra Club and others brought an action in the United States District Court for the District of Columbia seeking to require EPA to include a provision for the prevention of significant air quality deterioration in all state implementation plans. The District Court, in refusing to follow EPA's interpretation of the Act, ordered EPA to disapprove state plans which failed to provide measures to prevent significant deterioration of air quality and to pro-

provides that the Administrator must promulgate national ambient air quality standards for each air pollutant for which air quality criteria are issued.

[2]40 C.F.R. Part 50, 36 Fed. Reg. 22384 (November 25, 1971).

[3]40 C.F.R. Part 52, 37 Fed. Reg. 2581 (February 3, 1972); Section 110 (a) (2) (A)-(H), 42 U.S.C. § 1857c-5 (a) (2) (A)-(H), sets forth the eight requirements of state implementation plans which are (1) provisions for the attainment of primary and secondary standards within certain time periods, (2) emission limitations, schedules and time-tables for compliance with such limitations and such other measures to insure attainment and maintenance of such standards, (3) provisions for the establishment and operation of devices and procedures for monitoring and analyzing ambient air quality data, (4) procedures for reviewing the location of new sources to which the standards apply, (5) adequate provisions for intergovernmental cooperation, (6) assurance that the state will have adequate personnel, funding and authority to monitor and enforce compliance, and (7) provisions for modification of the plan to account for revisions in national ambient air quality standards or improved methods for achieving compliance.

mulgate regulations providing for such prevention in each state plan. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, (D.D.C. 1972). This initial decision on the issue of significant deterioration was issued in the procedural context of a preliminary injunction and thus was not a full and complete adjudication on the merits of the case. The decision was thereafter affirmed per curiam without opinion by the District of Columbia Circuit. *Sierra Club v. Ruckelshaus*, C.A. No. 72-1528 (D.C. Cir. 1972) (per curiam) and affirmed by this Court in an equally divided decision without opinion. *Fri. v. Sierra Club*, 412 U.S. 541 (1973).

In response to the Court's order, on July 16, 1973, EPA issued proposed regulations disapproving all state plans and providing four alternative provisions for prevention of significant air quality deterioration.[4] In issuing these regulations, EPA stated that there had been "no definitive resolution of the issue of whether the Clean Air Act requires prevention of significant deterioration of air quality" and that in its view the Act does not require such prevention.[5] EPA also admitted that the determination as to what level of air pollution constituted significant air quality deterioration was purely "subjective".[6]

Public hearings on these proposed regulations were held in five locations during August and September, 1973, and public comments were solicited. On August 27, 1974, the Administrator again proposed regulations providing for a revised plan for prevention of significant air quality deterioration.[7] While written comments were solicited, no hearings were held on this proposal. The final regulations which are the subject of this action were issued on Decem-

[4]38 Fed. Reg. 18986 (July 16, 1973).

[5]*Id.*

[6]*Id.* at 18988.

[7]39 Fed. Reg. 30999 (August 27, 1974).

ber 5, 1974,[8] with clarifying amendments adopted on June 12, 1975, and September 10, 1975. Effective January 6, 1975, these regulations apply to "any new or modified stationary source" as defined under the regulations and which commences construction or expansion after June 1, 1975.[9]

The EPA regulations are designed to prevent significant deterioration in the quality of air by limiting increases in the concentrations of particulate matter and sulfur dioxide by applicable sources in areas where air quality in 1974 is better than the national ambient air quality standards. Three classes of clear air areas are established. Class I and Class II areas are limited to maximum allowable incremental increases in sulfur dioxide and total suspended particulate matter over baseline air quality.[10] Class III areas are limited by the national ambient air standards.[11] While

[8]39 Fed. Reg. 42510 (December 5, 1974).

[9]40 C.F.R. § 52.21 (d) (1) (1974): The eighteen sources covered by these regulations include the following: (i) fossil-fuel steam electric plants of more than 1000 million B.T.U. per hour heat input; (ii) coal cleaning plants; (iii) Kraft pulp mills; (iv) Portland cement plants; (v) primary zinc smelters; (vi) iron and steel mills; (vii) primary aluminum ore reduction plants; (viii) primary copper smelters; (ix) municipal incinerators capable of charging more than 250 tons of refuse per 24-hour day; (x) sulfuric acid plants; (xi) petroleum refineries; (xii) lime plants; (xiii) phosphate rock processing plants; (xiv) by-product coke oven batteries; (xv) sulfur recovery plants; (xvi) carbon black plants (furnace process); (xvii) primary lead smelters; (xviii) fuel conversion plants.

[10]*Id.* at § 52.21 (c) (2) (i). The air quality increments for Class I and II areas are as follows:

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr maximum	5	100
3-hr maximum	25	700

[11]*Id.* at 52.21 (c) (2) (ii).

all areas of the states are originally designated Class II, the states are permitted to propose redesignation of areas as Class I, II or III.[12] However, the Federal Land Manager can propose redesignation of any Federal lands to a more restrictive classification.[13] Further, the regulations can prohibit the construction of a new source which would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the state. "For example, a power plant which just meets the Class II increment for SO_2 could, under certain conditions, violate the Class I increment for SO_2 60 or more miles away."[14] Thus the restrictions under these regulations go beyond the specific areas classified.

B. *The Decision Below*

Following the issuance of these EPA regulations, some 14 petitions seeking review were filed in various United States Courts of Appeal.[15] Those petitions which were not filed in the District of Columbia Circuit were transferred to that Court, and the Court consolidated all of the cases. Among the petitions filed was a petition of the petitioners herein seeking to overturn these regulations. The U. S. Court of Appeals for the District of Columbia Circuit, however, upheld the regulations, concluding that in the legislative history of the Act an understanding exists that the Act embodies a policy of non-deterioration of air clean-

[12]*Id.* at 52.21 (c) (3) (ii).

[13]*Id.* at 52.21 (c) (3) (iv).

[14]39 Fed. Reg. 42512 (December 5, 1974).

[15]Petitions were filed separately by American Petroleum Institute, Montana Power Company, Sierra Club, The Dayton Power and Light Company, Public Service Company of Colorado, Utah Power and Light Company, State of New Mexico, Pacific Coal Gasification Company, Utah International, Inc., Indiana-Kentucky Electric Corporation, Buckeye Power Inc., Salt River Project Agricultural Improvement and Power District, as well as the petitioners herein.

er than the national ambient air standards. Thus the Court below reaffirmed its prior ruling without opinion in *Sierra Club v. Ruckelshaus* and concluded that no support existed for the proposition that Section 110 (a) (2) of the Act and its specific requirements for state plans were intended to limit the policy of non-deterioration in any way.[16]

The Court below relied upon the Air Quality Act of 1967 and its legislative history which it found to express a policy of non-deterioration and to be accepted and followed in the Clean Air Act of 1970.[17] This policy is said to be based upon the "protect and enhance" language contained in Section 101 (b) of the Act. Thus the Court below found that the statutory basis for these regulations is the vague statutory purposes clause of the Act and is also supported by ambiguous, at best, legislative history. The Court found no support for such a requirement in the operative provisions of the Act. This finding was also made without any regard for the fact that EPA, when charged with implementing the Act, concluded that the Act did not require the implementation of a policy of non-deterioration.

The Court below rejected the industry petitioners' argument that this Court's decision in *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), is inconsistent with the requirement that all state plans which fail to prevent significant air quality deterioration be disapproved. In attempting to distinguish the *Train* decision, the Court stated that the *Train* decision concerned air pollution below rather than above national standards and the issue of non-deterioration was not considered.[18] Similarly, the Court below rejected this Court's decision in *Union Electric Co. v. EPA*, ... U.S. ....., 44 U.S.L.W. 5060 (June 25, 1976).

[16]Appendix A, page A-17.
[17]*Id.*, page A-18.
[18]*Id.*, page A-26.

The Court refused to recognize that the case before it likewise concerned whether EPA can require states to include provisions in state implementation plans which are not required under Section 110 of the Act.

REASONS FOR GRANTING THE WRIT

The issue of "significant deterioration of air quality" is one of critical importance not only to the petitioners herein[19] but also to the general public of this Nation. The limitations imposed by these regulations govern the future uses, development and growth of the vast lands throughout this country whose air is cleaner than the national ambient air standards.[20] The impact is particularly great upon the individual states which have traditionally determined the growth and destiny of state and local lands but must now submit to a uniform federal system of land use control under the guise of air quality regulations. EPA has well-stated the effect of its regulatory scheme to prevent significant air quality deterioration:

> "A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States. It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods."[21]

[19]In Addendum 1 and 3 of its brief below, Petitioners herein graphically illustrated the potential adverse impact of these regulations upon its operation within the four-state area of Alabama, Georgia, Mississippi and Florida. The potential impact could virtually eliminate the service area for the future construction of economically sized electric power plants.
[20]The majority of the lands of the United States have air which is cleaner than is required by the national ambient air standards. S. Rep. No. 94-717, 94th Cong., 2d Sess., 21 (1976).
[21]38 Fed. Reg. 18986 (July 16, 1973).

Considering the impact of such regulations, the issue of "significant air quality deterioration" must be a compelling one for full consideration by this Court. While this Court confronted the issue previously, it, without opinion, affirmed in an equally divided decision a lower court ruling which ordered regulations for prevention of significant deterioration. Thus the issue has not been definitively determined by this Court.[22]

The U. S. Congress has most recently confronted this issue by proposing legislation in an attempt to provide a definition and framework for a policy of preventing significant deterioration. However, after considerable debate, proposed amendments to the Clean Air Act died at the end of the Congressional session.[23] Thus, while attempting to remove the uncertainty surrounding the issue of significant deterioration, Congress has been ineffective in clarifying the issue.[24] For these reasons the issue, now more than ever, is a critical one for resolution by this Court.

1. *The Decision Below Conflicts with the Decisions of this Court as to the Proper Interpretation of the Clean Air Act.*

This issue of "significant deterioration of air quality" warrants consideration by this Court particularly in view

[22]Under the precedents of this Court, an affirmance by an equally divided court is not authority on the legal principles involved for the determination of other cases. See, e.g. Neil v. Biggers, 409 U.S. 188, 191-193 (1972); United States v. Pink, 315 U.S. 203 (1942).

[23]House Bill No. 10498 and Senate Bill No. 3219, 94th Cong., 2nd Session (1976) contained amendments to the Clean Air Act providing for prevention of significant air quality deterioration but these provisions differed from each other. A compromise provision was reported out of Conference Committee on September 30, 1976, debated, but was not passed by the Congress.

[24]Congress repeatedly recognized that the 1976 proposed amendments to the Clean Air Act were attempts to provide a precise definition and framework for a policy of significant deterioration, which was not contained in the Clean Air Act of 1970. See e.g., 122 Cong. Rec. No. 112, S12465 (Sen. Baker); 122 Cong. Rec. No. 119, H8296 (Rep. Rogers).

of this Court's recent decisions in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975) and *Union Electric Co. v. EPA*, ... U.S. ....., 44 U.S.L.W. 5060 (June 25, 1976). In both decisions, this Court made it clear that the requirements of state implementation plans are expressly set forth in Section 110(a) of the Act and that EPA cannot require more than what is specified therein. Yet, in this case, EPA has required more than what Section 110(a) calls for by requiring the implementation of a non-deterioration policy through state plans. Thus, this action by EPA is clearly in conflict with this Court's most recent interpretation of the Act.

In order to avoid the presentation of repetitive arguments in the various petitions filed in this case, petitioners will not attempt to present to the court a detailed statement of the reasons why such a conflict exists. In support of this petition, petitioners request this Court's consideration of and incorporate herein those reasons set forth in Montana Power Company's and American Petroleum Institute's petions for writ of certiorari filed with this Court in this proceeding.

2. *The Decision Below Raises Significant and Compelling Questions Concerning the Interpretation and Application of the Clean Air Act.*

This case also warrants this Court's consideration in view of the serious constitutional and legal issues raised by EPA's regulations for prevention of significant air quality deterioration. Among those constitutional questions are the lack of any legislative standards in the Act to guide EPA in implementing a policy of significant deterioration and the impairment of state powers under the U. S. Constitution as well as the Act to dictate state and local land uses and to control pollution within their boundaries. Among those

issues which regard the legality of EPA's actions are the lack of any authority under the Act for the implementation of a policy of significant deterioration and the arbitrary nature of the regulations which impose limits on pollution without any rational basis or proven effect upon public health and welfare. In support of this Court's full consideration of these issues and to avoid the presentation of repetitive arguments, petitioners urge consideration of and incorporate herein the arguments set forth in Montana Power Company's and American Petroleum Institute's petitions for writ of certiorari filed with this Court in this proceeding.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: October 28, 1976

PROOF OF SERVICE

I, S. Eason Balch, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 28th day of October, 1976, I mailed, first-class postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to the following persons:

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
RESPONDENTS

THE DAYTON POWER & LIGHT CO. ET AL., INTERVENORS

No. 74-2079

SIERRA CLUB ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
RESPONDENTS

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1369

UTAH POWER & LIGHT COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1372

UTAH INTERNATIONAL, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1664

BUCKEYE POWER, INC. ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., RESPONDENTS

SIERRA CLUB ET AL., INTERVENORS

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1666

ALABAMA POWER COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1763

MONTANA POWER COMPANY ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., RESPONDENTS

SIERRA CLUB ET AL., INTERVENORS

Petitions for Review of Regulations Promulgated by the Environmental Protection Agency

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Argued June 9, 1976

Decided August 2, 1976

Bruce J. Terris, with whom *Nathalie V. Black*, *John D. Hoffman*, and *H. Anthony Ruckel* were on the brief,

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*:

I. INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population • • •." Section 101(b)(1), 42 U.S.C. § 1857(b)(1). Pursuant to the court order in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.[1] The regulations employ a classifica-

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[1] The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. *See* Part V-A of this opinion *infra*. Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. *See* §§ 101(a)(3), (4) of the Act, 42 U.S.C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U.S.C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which • • • are requisite

to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109, 42 U.S.C. § 1857c-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4—50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U.S.C. § 1857c-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U.S.C. § 1857c-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(H), 42 U.S.C. § 1857c-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an implementation plan provide for revision (i) to take

tion scheme under which these "clean air" regions may be designated Class I, II, or III. All such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, Indian territory, or federal land may be redesignated after hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California[2] agree in some respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not

account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of the Act, 42 U.S.C. § 1857c-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

[2] The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. Litigation History

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a preliminary injunction and declared invalid an EPA regulation [3] which had required only that state implementation plans "be adequate to prevent * * * ambient pollution levels from exceeding * * * [the applicable] secondary standard." *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator." [4]

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[3] 40 C.F.R. § 51.12(b) (1975).

[4] *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972), JA Vol. IV at 1487.

As is apparent from the provisions of the Clean Air Act outlined above,[5] prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.[6] The decision was affirmed *per curiam* by this court, 4 E.R.C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration." [7] Final regu-

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[5] *See* note 1 *supra*.

[6] The legislative history is discussed at notes 32-38 *infra*.

[7] 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

> The basis for preventing significant deterioration * * * lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formulation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.
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> * * * *
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> The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the

lations were published December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. The Regulations

In promulgating final regulations[8] EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

> Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national standards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of January 1, 1975, with the intention that each area could determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

> Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.
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> Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.[9]

All areas initially are designated Class II,[10] and may be redesignated by proposal of a state, federal land manager, or Indian governing body where the state has

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aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

[8] "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

[9] Part 52 of 40 C.F.R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C.F.R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C.F.R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

[10] 40 C.F.R. § 52.21(c)(3)(i) (1975).

not assumed jurisdiction over Indian lands.[11] Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.[12]

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,[13] and if the proposed redesignation is based on the record of the hearing,

> which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[14]

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.[15] 40 C.F.R. § 52.21(c)(3)(vi)(*a*) (1975).[16] Federal land managers and Indian gov-

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[11] 40 C.F.R. §§ 52.21(c)(3)(ii), (iii), (iv), (v) (1975).

[12] 40 C.F.R. § 52.21(c)(iv) (1975).

[13] 40 C.F.R. §§ 52.21(c)(3)(ii)(*a*)-(*c*) (1975).

[14] 40 C.F.R. § 52.21(c)(3)(ii)(*d*) (1975).

[15] *See* discussion at notes 20-23 *infra*.

[16] In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi)(*e*) (1975).

erning bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.[17]

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.[18] No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.[19]

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.[20] Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not

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[17] 40 C.F.R. §§ 52.21(c)(3)(iv), (v) (1975).

[18] 40 C.F.R. § 52.21(c)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m^3)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

[19] 40 C.F.R. § 52.21(c)(2)(ii) (1975).

[20] 40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975).

violate the air quality increments applicable to *any* area.[21] The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide." [22] Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.[23]

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review. As EPA stated in proposing regulations:

> The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

39 Fed. Reg. at 31000 (August 27, 1974).

[21] 40 C.F.R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[22] 40 C.F.R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C.F.R. § 52.01(f) (1975).

[23] 40 C.F.R. § 52.21(f) (1975). *See also* 40 C.F.R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

IV. Standard of Review

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D) (1970). *Ethyl Corp. v. EPA*, —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 66-74 (No. 73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2)(D)), in excess of legislative authority (§ 706(2)(C)), unconstitutional (§ 706(2)(B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefor [24]; it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.[25] The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park*

[24] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

[25] *National Ass'n of Food Chains, Inc. v. ICC*, —— U.S. App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

v. Volpe, 401 U.S. 402, 416 (1972). *See Ethyl Corp. v. EPA, supra*, —— U.S.App.D.C. at —— n.74, —— F.2d at —— n.74, slip op. at 69 n.74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision [26]; that it "demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions." [27]

V. ARGUMENT

A. Should *Sierra Club v. Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club v. Ruckelshaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered, and (2) that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are inconsistent with the prior decision in *Sierra Club v. Ruckelshaus*.

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[26] We note that the basis of agency action must be provided *by the agency*; an order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding * * *." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see National Ass'n of Food Chains, Inc. v. ICC, supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip. op. at 12-13.

[27] *National Ass'n of Food Chains, Inc. v. ICC, supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip op. at 14.

The first argument obviously would require the clearest showing that *Sierra Club v. Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the "protect and enhance" language of Section 101(b)(1) nor the legislative history of the Clean Air Act need be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator "shall approve" a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.[28] We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club v. Ruckleshaus*.

The "protect and enhance" language of the Clear Air Act was added by the Air Quality Act of 1967, 81 STAT.

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[28] *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968): "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

485.[29] The administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,[30] and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that

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[29] *Air Quality Act of 1967*, S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

[30] *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 255 (D. D.C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967, supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

> "[A]n explicit purpose of the Act is "to *protect* and *enhance* the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L. J. 136 (1973) (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration*); *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

the "protect and enhance" language of Section 101 mandated the policy of nondeterioration. HEW Secretary Robert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

> In their implementation plans, the States would have to spell out the measures to be taken to achieve and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.
>
> As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" * * *. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air ever further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

> [i]*n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementa-*

> *tion plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.* Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Train v. NRDC, supra,* 421 U.S. at 64:

> The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *

The "stick" was the group of express requirements as to the content of state implementation plans.[31] The

[31] "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has led to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

"shall approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.[32] We have, however, found no indication, nor have we been cited to any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.[33]

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.[34] In

[32] *See* note 31 *supra.*

[33] *See The Concept of Non-Degradation, supra* note 30, at 819:

> The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

[34] *Chisholm v. FCC,* —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 26 (No. 75-1951, decided April 12, 1976):

> We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen,* 396 U.S. 168, 185-86 n. 21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price,* 361 U.S. 304, 310-11 (1960) (Harlan, J.).

Chisholm v. FCC, —— U.S. App.D.C. ——, —— F.2d —— (No. 75-1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpretation only "in a technical sense." —— U.S. App.D.C. at ——, —— F.2d at ——, slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U.S. at 274-275. The Court reached similar results in *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administration of Passport Act of 1926); *C.I.R. v. Estate of Noel*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-225 (1939); and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amendments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendements of 1976 (H.R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101(b) of the Act) that significant deterioration of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report [35] and reaffirmed the continuing policy of nondeterioration:

> A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the

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[35] *See* pp. 21-22 *supra*.

Clean Air Act does not contain a requirement of prevention of significant deterioration.

Our belief that *Sierra Club v. Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.[36] Petitioners suggest, however, that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. NRDC involved construction of the "shall approve" language of Section 110(a)(3)(A),[37] which requires that the Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards[38] or otherwise

[36] *See NRDC v. EPA*, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train v. NRDC*, 421 U.S. 60 (1975); *Big Rivers Electric Corp. v. EPA*, 8 ERC 1092 (6th Cir. 1975); *Union Electric Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd on other grounds*, —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976); *NRDC v. EPA*, 507 F.2d 905, 913 (9th Cir. 1974). *Cf. Highland Park v. Train*, 519 F.2d 681, 685 (7th Cir. 1975).

[37] "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

[38] Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970):

> The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

[continued]

violate the requirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U.S. at 79 (emphasis in original).[39] It is argued that this decision removes from the Administrator the dis-

> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

[39] The language was repeated in *Hancock v. Train*, —— U.S. ——, ——, 44 U.S. L. WEEK 4767, 4768 (June 7, 1976) (dictum), which concerned the obligation of federal facilities

cretion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club v. Ruckleshaus* be overturned. This argument, however, is subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club v. Ruckleshaus.*[40] Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train.*

In another recent decision, *Union Electric Co. v. EPA*, —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

> As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the

to comply with the requirements of state implementation plans.

[40] *NRDC v. EPA, supra* note 36, 489 F.2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U.S. at 69-70.

> States, but nonetheless subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train* v. *NRDC*, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
>
> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

—— U.S. at ——, 44 U.S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deteriation of air cleaner than the national standards be prevented.[41] Thus, despite the emphasis placed on (a)(2) by the opinions in *Train v. NRDC* and *Union Electric*, we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which

[41] As was the case in *Train v. NRDC*, the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co. v. EPA, supra* note 36, 515 F.2d at 220 n.39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

was enacted to encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other things, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary source requirements to those converting facilities,[42] and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air quality standards.[43] The ESECA is accommodated in the "significant deterioration" regulations by 40 C.F.R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or higher sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration.[44] The amendment was a necessary response to the nationwide shortage of oil and natural gas,

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[42] Section 119, 42 U.S.C. § 1857c-10 (Supp. IV 1974).

[43] Section 110(a)(3)(B), 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974).

[44] The "purpose" section of ESECA, 15 U.S.C. § 791 Supp. IV 1974), is as follows:

> The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment,* and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

and no reason has been presented for ascribing to it a greater significance.[45]

We therefore find no substantial reason to question, under ESECA or *Train*, the continuing validity of *Sierra Club v. Ruckleshaus*, and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,[46] whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidents as air pollutants which have an adverse effect on public health or welfare.[47] It is contended that the regulations violate the District Court's order in *Sierra Club v. Ruckleshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.[48]

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[45] We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

[46] *See* note 18 *supra*.

[47] 40 C.F.R. §§ 50.8-50.11 (1975).

[48] The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972).

EPA has responded that the interrelationships among those four pollutants, and the relationships between incremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

> These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO_2, and O_x) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pullutants. * * *
>
> The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants O_x and NO_2, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating*, 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed. Reg. 42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality*, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides." [49]

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the relevant factors. *Ethyl Corp. v. EPA*, *supra*, —— U.S. App.D.C. at ——-——, —— F.2d at ——-——, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.*, slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

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[49] 39 Fed. Reg. 31006 (Aug. 27, 1974).

C. Are Class II and Class III invalid as permitting significant deterioration of air quality?

D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,[50] it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must

[50] Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

determine what level of incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.[51]

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.[52] We therefore find that EPA acted within the discretion it is granted as to matters of policy [53] in choosing this design to prevent significant deterioration of air quality.

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating

[51] *See* pp. 12-13 *supra*.

[52] EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unregulated deterioration to the national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C.F.R. § 52.21(c)(3)(vi)(*a*).

[53] "However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whether the policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L. J. 1750, 1751 (1975).

normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme, based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.[54]

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will have their emissions counted against the allowable increment for the region. 40 C.F.R. § 52.21(d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not

[54] The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U.S.C. § 1857c-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

commenced construction or modification prior to June 1, 1975." 40 C.F.R. § 52.21(d)(1) (1975). "'Commenced' means that an owner or operator has understaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C.F.R. § 52.21(b)(7) (1975). *Compare* 40 C.F.R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C.F.R. § 52.21(d)(2) (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.[55] For the same reason we do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy

[55] Similarly, we find no ground for objection to the manner in which EPA has defined commencement of construction. 40 C.F.R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

decision to limit the instant regulations to prospective concerns only.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C.F.R. § 52.21(d)(ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01(f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C.F.R. §§ 52.21(d)(2)(ii), 52.01(f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of

necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable increment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train v. NRDC*, *supra*, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.[56]

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[56] The 19 listed categories are:

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
(ii) Coal Cleaning Plants.
(iii) Kraft Pulp Mills.
(iv) Portland Cement Plants.
(v) Primary Zinc Smelters.
(vi) Iron and Steel Mills.
(vii) Primary Aluminum Ore Reduction Plants.
(viii) Primary Copper Smelters.
(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
(x) Sulfuric Acid Plants.
(xi) Petroleum Refineries.
(xii) Lime Plants.
(xiii) Phosphate Rock Processing Plants.
(xiv) By-Product Coke Oven Batteries.
(xv) Sulfur Recovery Plants.
(xvi) Carbon Black Plants (furnace process).

[continued]

We find this argument subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only those sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter [57] does not mean there will of necessity be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

> The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO_2 and TSP on a nationwide basis. Fuel conversion plants (coal gasification and liquefication, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories is reviewed.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefor, was settled by the *Sierra Club v. Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the

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(xvii) Primary Lead Smelters.
(xviii) Fuel Conversion Plants.
(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[57] The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

> [T]he criteria the Administrator intends to use in adding further sources in the future * * * are:
>
> (1) a new source performance standard for sulfur dioxide (SO_2) or particulate matter has been established for the source or any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO_2 or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The later notice also added the 19th category, Ferroalloy production facilities.

nation's air, even in the absence of quantified evidence of adverse effects.[58]

The District Court order in *Sierra Club v. Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evaluation of the relative importance

[58] EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

> Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.
>
> Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 6. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.[59]

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal, and we believe EPA has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of significant deterioration.

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners[60] have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air,

[59] *See* pp. 16-17 *supra*.

[60] *See, e.g.*, br. of American Petroleum Institute *et al.* in No. 75-1665 at 38.

do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of different sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

J. Did EPA violate the Clean Air Act

(1) by not permitting submission of revised plans before promulgating regulations, or

(2) by not holding hearings in each state before promulgating the regulations?

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection

(c)(1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amended the implementation plans of all states,[61] constituted a "revision" under Section 110(a)(2)(H). Under Section 110(c)(1)(C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a)(2)(H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110(c)(1) to hold a hearing in each state before promulgating the regulations.

The original order of the District Court required that the "Administrator * * * prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972). That order —which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

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[61] *See* note 9 *supra*.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.[62] After disapproving all state plans insofar as they failed to prevent significant deterioration,[63] the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,[64] and solicited written comments.[65] We believe that procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an excercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are presented only with a generalized statutory claim,[66] which apparently never was raised before the

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[62] In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

[63] 37 Fed. Reg. 23836 (Nov. 9, 1972).

[64] *See* 39 Fed. Reg. 31000 (Aug. 27, 1974).

[65] *Id.*

[66] *Cf. American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310 318-319, 359 F.2d 624, 632-633, *cert. denied*, 385 U.S. 843 (1966):

[Continued]

Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the nondeterioration regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute prevents significant deterioration of air quality.[67] We cannot conclude, then, that the regulations are defective on procedural grounds.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C.F.R. § 52.21(c)(3) (1975).[68] The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their bound-

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> [T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. * * *

See also United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952).

[67] *See* pp. 16-17 *supra*.

[68] *See* pp. 13-14 *supra*.

aries in Section 101(a)(3), 42 U.S.C. § 1857(a)(3),[69] and Section 107(a), 42 U.S.C. § 1857c-2(a),[70] that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U.S.C. § 1857f,[71] and that the authority to redesignate gives these lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.[72]

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[69] 42 U.S.C. § 1857(a)(3) (1970):

(a) The Congress finds—

• • • •

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

[70] 42 U.S.C. § 1857c-2(a) (1970):

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

[71] 42 U.S.C. § 1857f (1970):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so * * *. * * *

[72] *See* 39 Fed. Reg. 42512 (Dec. 5, 1974):

Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air

EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,[73] and that the Administrator may disapprove redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.[74] With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,[75] and thus cannot contribute to unwanted deterioration of air quality.

We pretermit this question, as we find that the issue is not yet ripe for review.[76] No federal or Indian land

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quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [*sic*] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

[73] 40 C.F.R. § 52.21(c)(3)(iv), (v) (1975).

[74] 40 C.F.R. § 52.21(c)(3)(vi)(*b*), (*c*) (1975).

[75] 40 C.F.R. § 52.21(c)(3)(iv) (1975).

[76] *See Toilet Goods Ass'n Inc. v. Gardner*, 387 U.S. 158 (1967), in which cosmetic manufacturers had brought a pre-

has yet been redesignated, and to that extent we cannot be certain how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indians governing bodies should have no

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enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific section of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164 (emphasis in original).

effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government under the commerce clause,[77] and we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other contexts.[78] Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,[79] and there is a proper legislative purpose[80] in prevention of significant

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[77] *See District of Columbia v. Train*, 172 U.S.App.D.C. 311, 328, 521 F.2d 971, 988 (1975); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

[78] Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

[79] *See* note 58 *supra*.

[80] *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-259 (1964), in which the Court held the Civil

deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking." [81] The use of private land certainly is limited, but the limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities v. Usery*, —— U.S. ——, 44 U.S. L. WEEK 4974 (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 521 F.2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no af-

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Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

> Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also Nebbia v. New York, 291 U.S. 502, 537 (1934) (Fourteenth Amendment).

[81] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

> [T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the owner. The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner. * * *

firmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C.F.R. § 52.21(d), (f) (1975).

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.[82] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 676-677 (1st Cir. 1974).

VI. CONCLUSION

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration"

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[82] In *Lichter v. United States*, 334 U.S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are

regulations.[33] Our review of *Sierra Club v. Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the non-deterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge WILKEY concurs in the result only.

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to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 104. * * *

[33] As noted above, *see* pp. 49-51, we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

APPENDIX B

RELEVANT PORTIONS OF THE CLEAN AIR ACT

§§ 101, 103(f), 108, 109, 110, 111, 116, 302, 304, 307(b)

Findings and Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, state, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Research, Investigation, Training, and Other Activities

Sec. 103.

(f)(1) In carrying out research pursuant to this Act, the Ad-

ministrator shall give special emphasis to research on the short- and long-term effects of air pollutants on public health and welfare. In the furtherance of such research, he shall conduct an accelerated research program

(A) to improve knowledge of the contribution of air pollutants to the occurrence of adverse effects of health, including, but not limited to, behavioral, physiological, toxicological, and biochemical effects; and

(B) to improve knowledge of the short- and long-term effects of air pollutants on welfare.

(2) In carrying out the provisions of this subsection the Administrator may

(A) conduct epidemiological studies of the effects of air pollutants on mortality and morbidity;

(B) conduct clinical and laboratory studies on the immunologic, biochemical, physiological, and toxicological effects including carcinogenic, teratogenic, and mutagenic effects of air pollutants;

(C) utilize, on a reimbursable basis, the facilities of existing Federal scientific laboratories and research centers;

(D) utilize the authority contained in paragraphs (1) through (4) of subsection (b); and

(E) consult with other appropriate Federal agencies to assure that research or studies conducted pursuant to this subsection will be coordinated with research and studies of such other Federal agencies.

(3) In entering into contracts under this subsection, the Administrator is authorized to contract for a term not to exceed 10 years in duration. For the purposes of this paragraph, there are authorized to be appropriated $15,000,000. Such amounts as are appropriated shall remain available until expended and shall be in addition to any other appropriations under this Act.

Air Quality Criteria and Control Techniques

Sec. 108. (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) (1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of pre-

vention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals, representatives of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

National Ambient Air Quality Standards

Sec. 109. (a)(1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards

for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under Section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental co-operation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment

by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standards or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Ad-

ministrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources) and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise

an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (II).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not

condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to

which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and

(D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceding under this subsection.

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term 'existing source' means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories

of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110

under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Retention of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[PL 93-319, June 24, 1974]

Definitions

Sec. 302. When used in this Act—

(a) The term 'Administrator' means the Administrator of the Environmental Protection Agency.

(b) The term 'air pollution control agency' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term 'interstate air pollution control agency' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term 'State' means a State, the District of Columbia, the Commonwealth of Puero Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term 'person' includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term 'municipality' means a city, town, borough, county, parish, district or other public body created by or pursuant to State law.

(g) The term 'air pollutant' means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

Citizen Suits

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator of a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy of the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a) (1)

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violation of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that

such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c)(1)(B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitatios or an order re pecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

General Provision Relating to Administrative Proceedings and Judicial Review

Sec. 307

(b) (1) A petition for review of action of the Administrator in

promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

[PL 93-319, June 24, 1974]

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

APPENDIX C

EPA REGULATIONS ENTITLED "PREVENTION OF SIGNIFICANT AIR QUALITY DETERIORATION"

40 C.F.R. §§ 52.01(d) and (f), 52.21

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 *Definitions.*

* * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which, is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

2. Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

§ 52.21 *Significant deterioration of air quality.*

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and means the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval (pursuant to approved new source review procedures in the plan) for construction or modification but not yet operating prior

to January 1, 1975. These concentrations shall be established for all time periods covered by the increments set forth under paragraph (c)(2)(i) of this section and may be measured or estimated. In the case of the maximum three-hour and twenty-four-hour concentrations, only the second highest concentrations should be considered.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection, or installation of an affected facility.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) This paragraph applies to all States listed in Subpart B through DDD of this part, all lands owned by the Federal Government, and Indian Reservations, except those counties or other functionally equivalent areas that pervasively exceed any national ambient air quality standards for sulfur oxides or total suspended particulates and then only with respect to such pollutants. States shall notify the Administrator by June 1, 1975, of those areas which are above the national air quality standards and therefore are exempt from the requirements of this paragraph.

(2) (i) For purpose of this paragraph, areas designated as Class I or Class II shall be limited to the following increases in pollutant concentrations over the baseline air quality concentration:

Area designations

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(3) (i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States which may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (*1*) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (*2*) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph, (*3*) that the State has not requested delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (2) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances con-

Supreme Court, U. S.
FILED
OCT 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-603

ALABAMA POWER COMPANY,
GEORGIA POWER COMPANY,
GULF POWER COMPANY and
MISSISSIPPI POWER COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, as Administrator,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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RUSSELL E. TRAIN, as Administrator,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners, Alabama Power Company, Georgia Power Company, Gulf Power Company and Mississippi Power Company, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 2, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, not officially reported, appears in Appendix A hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976. This Petition for Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) acted beyond the scope of its authority under the Clean Air Act of 1970 (the Act) in promulgating regulations for the prevention of significant air quality deterioration?

2. Assuming the Act requires the prevention of significant air quality deterioration, whether the EPA regulations for prevention of significant air quality deterioration should be set aside as unauthorized under the Act when:

(a) the regulations establish arbitrary air quality increments with no rational basis and which are unrelated to known or quantifiable adverse effects on public health and welfare; and

(b) the regulations grant effective control to the Federal government over the classification of Federal and Indian lands and adjacent state and local lands and thereby abrogate the authority granted to the states under the Act.

3. Assuming the EPA regulations for prevention of significant air quality deterioration are otherwise lawful, whether these regulations are unconstitutional when:

(a) the Act does not set forth any meaningful standard for EPA to establish regulations for prevention of significant air quality deterioration and thus the regulations result from an unlawful delegation of legislative power in violation of Article I, Section I of the U. S. Constitution; and

(b) the regulations grant unrestricted control to the Federal government over state and local land uses and policies and thereby deprive the states of their powers reserved under the Tenth Amendment to the U. S. Constitution.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 1857, et seq. and the EPA regulations entitled "Prevention of Significant Air Quality Deterioration", 40 C.F.R. §§ 52.01 (d) and (f), 52.21, appear in Appendices B and C hereto.

STATEMENT OF THE CASE

This case involves the review of the action of EPA, respondent herein, in issuing regulations entitled "Prevention of Significant Air Quality Deterioration", pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 1857, et seq. (the Act), which disapprove of state implementation plans adopted under the Act to the extent that such plans lack regulations for prevention of significant deterioration of air quality and promulgate revisions to such plans for portions of those states where air quality is better than the national primary and secondary air standards.

A. *History of the Regulations*

Pursuant to the Act, EPA established national primary and secondary ambient air quality standards for each air pollutant deemed to have an adverse effect on public health and welfare and for which air quality criteria were issued.[1]

[1]Section 108 (a) (2) of the Act, 42 U.S.C. § 1857c-3 (a) (2), provides that the Administrator must issue air quality criteria for each air pollutant which "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air in varying quantities." Section 109 (a), 42 U.S.C. § 1857c-4 (a),

The primary air quality standards established pursuant to Section 109 of the Act are those standards which, allowing an adequate margin of safety, are requisite to protect the public health, and secondary standards are those which are requisite to protect the public welfare from any known or anticipated adverse effects of the specified air pollutants. Following the promulgation of these standards in 1971[2] and pursuant to Section 110 of the Act, each state promulgated a plan to implement, maintain and enforce the national standards and submitted such plan to EPA for approval. EPA initially approved all state implementation plans which complied with the eight requirements set forth in Section 110 (a) (2) of the Act.[3]

Thereafter, the Sierra Club and others brought an action in the United States District Court for the District of Columbia seeking to require EPA to include a provision for the prevention of significant air quality deterioration in all state implementation plans. The District Court, in refusing to follow EPA's interpretation of the Act, ordered EPA to disapprove state plans which failed to provide measures to prevent significant deterioration of air quality and to promulgate regulations providing for such prevention in each state plan. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253, (D.D.C. 1972). This initial decision on the issue of significant deterioration was issued in the procedural context of a preliminary injunction and thus was not a full and complete adjudication on the merits of the case. The decision was thereafter affirmed per curiam without opinion by the District of Columbia Circuit. *Sierra Club v. Ruckelshaus*, C.A. No. 72-1528 (D.C. Cir. 1972) (per curiam) and affirmed by this Court in an equally divided decision without opinion. *Fri. v. Sierra Club*, 412 U.S. 541 (1973).

provides that the Administrator must promulgate national ambient air quality standards for each air pollutant for which air quality criteria are issued.

[2]40 C.F.R. Part 50, 36 Fed. Reg. 22384 (November 25, 1971).

[3]40 C.F.R. Part 52, 37 Fed. Reg. 2581 (February 3, 1972); Section 110 (a) (2) (A)-(H), 42 U.S.C. § 1857c-5 (a) (2) (A)-(H), sets forth the eight requirements of state implementation plans which are (1) provisions for the attainment of primary and secondary standards within certain time periods, (2) emission limitations, schedules and time-tables for compliance with such limitations and such other measures to insure attainment and maintenance of such standards, (3) provisions for the establishment and operation of devices and procedures for monitoring and analyzing ambient air quality data, (4) procedures for reviewing the location of new sources to which the standards apply, (5) adequate provisions for intergovernmental cooperation, (6) assurance that the state will have adequate personnel, funding and authority to monitor and enforce compliance, and (7) provisions for modification of the plan to account for revisions in national ambient air quality standards or improved methods for achieving compliance.

In response to the Court's order, on July 16, 1973, EPA issued proposed regulations disapproving all state plans and providing four alternative provisions for prevention of significant air quality deterioration.[4] In issuing these regulations, EPA stated that there had been "no definitive resolution of the issue of whether the Clean Air Act requires prevention of significant deterioration of air quality" and that in its view the Act does not require such prevention.[5] EPA also admitted that the determination as to what level of air pollution constituted significant air quality deterioration was purely "subjective".[6]

Public hearings on these proposed regulations were held in five locations during August and September, 1973, and public comments were solicited. On August 27, 1974, the Administrator again proposed regulations providing for a revised plan for prevention of significant air quality deterioration.[7] While written comments were solicited, no hearings were held on this proposal. The final regulations which are the subject of this action were issued on Decem-

[4]38 Fed. Reg. 18986 (July 16, 1973).

[5]*Id.*

[6]*Id.* at 18988.

[7]39 Fed. Reg. 30999 (August 27, 1974).

ber 5, 1974,[8] with clarifying amendments adopted on June 12, 1975, and September 10, 1975. Effective January 6, 1975, these regulations apply to "any new or modified stationary source" as defined under the regulations and which commences construction or expansion after June 1, 1975.[9]

The EPA regulations are designed to prevent significant deterioration in the quality of air by limiting increases in the concentrations of particulate matter and sulfur dioxide by applicable sources in areas where air quality in 1974 is better than the national ambient air quality standards. Three classes of clear air areas are established. Class I and Class II areas are limited to maximum allowable incremental increases in sulfur dioxide and total suspended particulate matter over baseline air quality.[10] Class III areas are limited by the national ambient air standards.[11] While

[8]39 Fed. Reg. 42510 (December 5, 1974).

[9]40 C.F.R. § 52.21 (d) (1) (1974): The eighteen sources covered by these regulations include the following: (i) fossil-fuel steam electric plants of more than 1000 million B.T.U. per hour heat input; (ii) coal cleaning plants; (iii) Kraft pulp mills; (iv) Portland cement plants; (v) primary zinc smelters; (vi) iron and steel mills; (vii) primary aluminum ore reduction plants; (viii) primary copper smelters; (ix) municipal incinerators capable of charging more than 250 tons of refuse per 24-hour day; (x) sulfuric acid plants; (xi) petroleum refineries; (xii) lime plants; (xiii) phosphate rock processing plants; (xiv) by-product coke oven batteries; (xv) sulfur recovery plants; (xvi) carbon black plants (furnace process); (xvii) primary lead smelters; (xviii) fuel conversion plants.

[10]*Id.* at § 52.21 (c) (2) (i). The air quality increments for Class I and II areas are as follows:

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr maximum	5	100
3-hr maximum	25	700

[11]*Id.* at 52.21 (c) (2) (ii).

all areas of the states are originally designated Class II, the states are permitted to propose redesignation of areas as Class I, II or III.[12] However, the Federal Land Manager can propose redesignation of any Federal lands to a more restrictive classification.[13] Further, the regulations can prohibit the construction of a new source which would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the state. "For example, a power plant which just meets the Class II increment for SO_2 could, under certain conditions, violate the Class I increment for SO_2 60 or more miles away."[14] Thus the restrictions under these regulations go beyond the specific areas classified.

B. *The Decision Below*

Following the issuance of these EPA regulations, some 14 petitions seeking review were filed in various United States Courts of Appeal.[15] Those petitions which were not filed in the District of Columbia Circuit were transferred to that Court, and the Court consolidated all of the cases. Among the petitions filed was a petition of the petitioners herein seeking to overturn these regulations. The U. S. Court of Appeals for the District of Columbia Circuit, however, upheld the regulations, concluding that in the legislative history of the Act an understanding exists that the Act embodies a policy of non-deterioration of air clean-

[12]*Id.* at 52.21 (c) (3) (ii).

[13]*Id.* at 52.21 (c) (3) (iv).

[14]39 Fed. Reg. 42512 (December 5, 1974).

[15]Petitions were filed separately by American Petroleum Institute, Montana Power Company, Sierra Club, The Dayton Power and Light Company, Public Service Company of Colorado, Utah Power and Light Company, State of New Mexico, Pacific Coal Gasification Company, Utah International, Inc., Indiana-Kentucky Electric Corporation, Buckeye Power Inc., Salt River Project Agricultural Improvement and Power District, as well as the petitioners herein.

er than the national ambient air standards. Thus the Court below reaffirmed its prior ruling without opinion in *Sierra Club v. Ruckelshaus* and concluded that no support existed for the proposition that Section 110 (a) (2) of the Act and its specific requirements for state plans were intended to limit the policy of non-deterioration in any way.[16]

The Court below relied upon the Air Quality Act of 1967 and its legislative history which it found to express a policy of non-deterioration and to be accepted and followed in the Clean Air Act of 1970.[17] This policy is said to be based upon the "protect and enhance" language contained in Section 101 (b) of the Act. Thus the Court below found that the statutory basis for these regulations is the vague statutory purposes clause of the Act and is also supported by ambiguous, at best, legislative history. The Court found no support for such a requirement in the operative provisions of the Act. This finding was also made without any regard for the fact that EPA, when charged with implementing the Act, concluded that the Act did not require the implementation of a policy of non-deterioration.

The Court below rejected the industry petitioners' argument that this Court's decision in *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), is inconsistent with the requirement that all state plans which fail to prevent significant air quality deterioration be disapproved. In attempting to distinguish the *Train* decision, the Court stated that the *Train* decision concerned air pollution below rather than above national standards and the issue of non-deterioration was not considered.[18] Similarly, the Court below rejected this Court's decision in *Union Electric Co. v. EPA*, ... U.S. ....., 44 U.S.L.W. 5060 (June 25, 1976).

[16]Appendix A, page A-17.
[17]*Id.*, page A-18.
[18]*Id.*, page A-26.

The Court refused to recognize that the case before it likewise concerned whether EPA can require states to include provisions in state implementation plans which are not required under Section 110 of the Act.

REASONS FOR GRANTING THE WRIT

The issue of "significant deterioration of air quality" is one of critical importance not only to the petitioners herein[19] but also to the general public of this Nation. The limitations imposed by these regulations govern the future uses, development and growth of the vast lands throughout this country whose air is cleaner than the national ambient air standards.[20] The impact is particularly great upon the individual states which have traditionally determined the growth and destiny of state and local lands but must now submit to a uniform federal system of land use control under the guise of air quality regulations. EPA has well-stated the effect of its regulatory scheme to prevent significant air quality deterioration:

> "A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature, extent, and location of future industrial, commercial, and residential development throughout the United States. It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods."[21]

[19]In Addendum 1 and 3 of its brief below, Petitioners herein graphically illustrated the potential adverse impact of these regulations upon its operation within the four-state area of Alabama, Georgia, Mississippi and Florida. The potential impact could virtually eliminate the service area for the future construction of economically sized electric power plants.
[20]The majority of the lands of the United States have air which is cleaner than is required by the national ambient air standards. S. Rep. No. 94-717, 94th Cong., 2d Sess., 21 (1976).
[21]38 Fed. Reg. 18986 (July 16, 1973).

Considering the impact of such regulations, the issue of "significant air quality deterioration" must be a compelling one for full consideration by this Court. While this Court confronted the issue previously, it, without opinion, affirmed in an equally divided decision a lower court ruling which ordered regulations for prevention of significant deterioration. Thus the issue has not been definitively determined by this Court.[22]

The U. S. Congress has most recently confronted this issue by proposing legislation in an attempt to provide a definition and framework for a policy of preventing significant deterioration. However, after considerable debate, proposed amendments to the Clean Air Act died at the end of the Congressional session.[23] Thus, while attempting to remove the uncertainty surrounding the issue of significant deterioration, Congress has been ineffective in clarifying the issue.[24] For these reasons the issue, now more than ever, is a critical one for resolution by this Court.

1. *The Decision Below Conflicts with the Decisions of this Court as to the Proper Interpretation of the Clean Air Act.*

This issue of "significant deterioration of air quality" warrants consideration by this Court particularly in view

[22]Under the precedents of this Court, an affirmance by an equally divided court is not authority on the legal principles involved for the determination of other cases. See, e.g. Neil v. Biggers, 409 U.S. 188, 191-193 (1972); United States v. Pink, 315 U.S. 203 (1942).

[23]House Bill No. 10498 and Senate Bill No. 3219, 94th Cong., 2nd Session (1976) contained amendments to the Clean Air Act providing for prevention of significant air quality deterioration but these provisions differed from each other. A compromise provision was reported out of Conference Committee on September 30, 1976, debated, but was not passed by the Congress.

[24]Congress repeatedly recognized that the 1976 proposed amendments to the Clean Air Act were attempts to provide a precise definition and framework for a policy of significant deterioration, which was not contained in the Clean Air Act of 1970. See e.g., 122 Cong. Rec. No. 112, S12465 (Sen. Baker); 122 Cong. Rec. No. 119, H8296 (Rep. Rogers).

of this Court's recent decisions in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975) and *Union Electric Co. v. EPA*, ... U.S. ....., 44 U.S.L.W. 5060 (June 25, 1976). In both decisions, this Court made it clear that the requirements of state implementation plans are expressly set forth in Section 110(a) of the Act and that EPA cannot require more than what is specified therein. Yet, in this case, EPA has required more than what Section 110(a) calls for by requiring the implementation of a non-deterioration policy through state plans. Thus, this action by EPA is clearly in conflict with this Court's most recent interpretation of the Act.

In order to avoid the presentation of repetitive arguments in the various petitions filed in this case, petitioners will not attempt to present to the court a detailed statement of the reasons why such a conflict exists. In support of this petition, petitioners request this Court's consideration of and incorporate herein those reasons set forth in Montana Power Company's and American Petroleum Institute's petions for writ of certiorari filed with this Court in this proceeding.

2. *The Decision Below Raises Significant and Compelling Questions Concerning the Interpretation and Application of the Clean Air Act.*

This case also warrants this Court's consideration in view of the serious constitutional and legal issues raised by EPA's regulations for prevention of significant air quality deterioration. Among those constitutional questions are the lack of any legislative standards in the Act to guide EPA in implementing a policy of significant deterioration and the impairment of state powers under the U. S. Constitution as well as the Act to dictate state and local land uses and to control pollution within their boundaries. Among those

issues which regard the legality of EPA's actions are the lack of any authority under the Act for the implementation of a policy of significant deterioration and the arbitrary nature of the regulations which impose limits on pollution without any rational basis or proven effect upon public health and welfare. In support of this Court's full consideration of these issues and to avoid the presentation of repetitive arguments, petitioners urge consideration of and incorporate herein the arguments set forth in Montana Power Company's and American Petroleum Institute's petitions for writ of certiorari filed with this Court in this proceeding.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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Dated: October 28, 1976

PROOF OF SERVICE

I, S. Eason Balch, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certifies that, on the 28th day of October, 1976, I mailed, first-class postage prepaid, three copies of the foregoing Petition for Writ of Certiorari to the following persons:

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APPENDIX

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-2063

SIERRA CLUB, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
RESPONDENTS

THE DAYTON POWER & LIGHT CO. ET AL., INTERVENORS

No. 74-2079

SIERRA CLUB ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL.,
RESPONDENTS

No. 75-1368

PUBLIC SERVICE COMPANY OF COLORADO ET AL.,
PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1369

UTAH POWER & LIGHT COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1370

STATE OF NEW MEXICO EX REL. NEW MEXICO ENVIRONMENTAL IMPROVEMENT AGENCY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1371

PACIFIC COAL GASIFICATION COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1372

UTAH INTERNATIONAL, INC., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1575

INDIANA-KENTUCKY ELECTRIC CORPORATION ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1663

THE DAYTON POWER & LIGHT COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1664

BUCKEYE POWER, INC. ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., RESPONDENTS

SIERRA CLUB ET AL., INTERVENORS

No. 75-1665

AMERICAN PETROLEUM INSTITUTE ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1666

ALABAMA POWER COMPANY ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1763

MONTANA POWER COMPANY ET AL., PETITIONERS

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RESPONDENT

SIERRA CLUB ET AL., INTERVENORS

No. 75-1764

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY ET AL., RESPONDENTS

SIERRA CLUB ET AL., INTERVENORS

Petitions for Review of Regulations Promulgated by the Environmental Protection Agency

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Argued June 9, 1976

Decided August 2, 1976

Bruce J. Terris, with whom *Nathalie V. Black*, *John D. Hoffman*, and *H. Anthony Ruckel* were on the brief,

Before WRIGHT, ROBINSON, and WILKEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*:

I. INTRODUCTION

One of the primary purposes of the Clean Air Act, 42 U.S.C. § 1857 *et seq.* (1970), is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population • • •." Section 101(b)(1), 42 U.S.C. § 1857(b)(1). Pursuant to the court order in *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972), *aff'd per curiam*, 4 ERC 1815 (D.C. Cir. 1972), *aff'd by an equally divided Court, sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973), the Administrator of the Environmental Protection Agency (EPA) promulgated regulations designed to prevent "significant deterioration" of air quality in those areas which have air that already is cleaner than the national ambient air quality standards.[1] The regulations employ a classifica-

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[1] The twin objectives of the Clean Air Act are to improve air quality where pollution levels do not meet national minimum standards, and to protect the quality of air that already, as in this case, is cleaner than national standards. *See* Part V-A of this opinion *infra*. Accomplishment of those objectives is to be a joint enterprise of the federal government and the states, the former providing informed guidance to the implementation efforts of the latter. *See* §§ 101(a)(3), (4) of the Act, 42 U.S.C. §§ 1857(a)(3), (4).

Section 108 of the Act, 42 U.S.C. § 1857c-3, required the Administrator of EPA to publish a list of air pollutants which have "an adverse effect on public health or welfare." The Administrator was then to promulgate national primary and secondary ambient air quality standards for those specified pollutants. National *primary* air quality standards are those "the attainment and maintenance of which • • • are requisite

to protect the public health"; national *secondary* standards are those "requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air." Section 109, 42 U.S.C. § 1857c-4. The Administrator has promulgated national primary and secondary air quality standards for six pollutants: sulfur dioxide, particulate matter, carbon monoxide, photochemical oxidants, hydrocarbons, and nitrogen dioxide. 40 C.F.R. §§ 50.4—50.11 (1975).

The states are charged with the duty to develop implementation plans designed to achieve the level of air quality prescribed by the national primary and secondary standards:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

Section 107, 42 U.S.C. § 1857c-2. The plans are submitted to the Administrator for approval under the provisions of § 110 of the Act, 42 U.S.C. § 1857c-5 (1970), *as amended* (Supp. IV 1974). A proposed implementation plan must satisfy the requirements of § 110(a)(2)(A)-(H), 42 U.S.C. § 1857c-5(a)(2)(A)-(H), which requirements include attainment of the national primary standards within three years after approval of the plan, and attainment of the secondary standards within a "reasonable time." Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A).

Section 110 also provides that the Administrator is promptly to prepare and publish his own regulations for a state if (a) it fails to submit a plan, (b) the plan "is determined by the Administrator not to be in accordance with the requirements of this section," or (c) the state fails to revise its plan pursuant to a provision required by § 110(a)(2)(H). Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection (c)(1) of § 110 also contains a conditional hearing requirement for these "replacement" implementation plans: "If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation." Subsection (a)(2)(H) requires that an implementation plan provide for revision (i) to take

tion scheme under which these "clean air" regions may be designated Class I, II, or III. All such areas initially are designated Class II, under which specified increments in sulfur dioxide and particulate matter pollution are considered "insignificant." A state, Indian territory, or federal land may be redesignated after hearing and by application to EPA. Designation as Class I implies a region of very clean air, in which relatively small increments in air pollution would be considered significant deterioration; Class III areas are those in which deterioration of air quality to the national ambient air quality standards would be considered insignificant.

The court has heard the regulations attacked from several perspectives. Petitioner Sierra Club contends that the regulations fail, in a variety of ways, to prevent significant deterioration of existing clean air. The States of New Mexico, Wyoming, and California[2] agree in some respects with Sierra Club, but are concerned that the regulations infringe on the general regulatory authority vested in the states by the Clean Air Act. A large number of electric power companies and industrial organizations have argued that the regulations are not

account of changes in either technology or the national standards and (ii) whenever the Administrator determines that the plan is inadequate to achieve the primary or secondary standards.

The basic structure described above is supplemented by § 111 of the Act, 42 U.S.C. § 1857c-6 (1970), *as amended* (Supp. IV 1974), which provides for promulgation of "standards of performance" for emission limitations of significant new sources of pollution, by categories of sources. The standards must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."

[2] The three named states are joined by Maine, Alabama, Colorado, Kansas, Minnesota, South Dakota, and Florida.

authorized by the Clean Air Act, that their promulgation was procedurally defective, that the allowable increments are arbitrary and capricious, and that the regulatory structure created by the regulations is unconstitutional.

We conclude that the Administrator's action is rationally based and has not been shown to be either without his authority or unconstitutional. We therefore do not disturb the regulations as promulgated.

II. Litigation History

Suit was filed in May 1972 by the Sierra Club and other environmental protection groups for a declaratory judgment that the Clean Air Act prohibited approval of state implementation plans which permitted significant deterioration of air cleaner than the national secondary standards, and for injunctive relief to prevent the Administrator from approving those portions of state implementation plans which would permit significant deterioration. District Judge John H. Pratt granted plaintiffs' motion for a preliminary injunction and declared invalid an EPA regulation [3] which had required only that state implementation plans "be adequate to prevent * * * ambient pollution levels from exceeding * * * [the applicable] secondary standard." *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253 (D. D.C. 1972). The Administrator was enjoined from approving any state plan "unless he approves the state plan subject to subsequent review by him to insure that it does not permit significant deterioration of existing air quality in any portion of any state where the existing air quality is better than one or more of the secondary standards promulgated by the Administrator." [4]

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[3] 40 C.F.R. § 51.12(b) (1975).

[4] *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972), JA Vol. IV at 1487.

As is apparent from the provisions of the Clean Air Act outlined above,[5] prohibition of significant deterioration of air cleaner than the national standards is not an express requirement of the Act. Judge Pratt based his decision, rather, on the "protect and enhance" language of Section 101(b)(1) of the Act and on the legislative history of both the Clean Air Act of 1970 and the Air Quality Act of 1967.[6] The decision was affirmed *per curiam* by this court, 4 E.R.C. 1815 (1972), and was affirmed by an equally divided Supreme Court, *sub nom. Fri v. Sierra Club*, 412 U.S. 541 (1973).

Pursuant to that order, the Administrator reviewed and disapproved all state plans insofar as they failed to provide for prevention of significant deterioration. 37 Fed. Reg. 22836 (November 9, 1971). Four alternative sets of regulations were proposed for public comment, in an effort to determine what meaning to give the concept of "significant deterioration." [7] Final regu-

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[5] *See* note 1 *supra*.

[6] The legislative history is discussed at notes 32-38 *infra*.

[7] 38 Fed. Reg. 18986 (July 16, 1973). In proposing alternative solutions, EPA posed for public debate the problem of how significant deterioration was to be defined:

> The basis for preventing significant deterioration * * * lies in a desire to protect aesthetic, scenic, and recreational values, particularly in rural areas, and in concern that some air pollutants may have adverse effects that have not been documented in such a way as to permit their consideration in the formulation of national ambient air quality scientific data on the kind and extent of adverse effects of air pollution levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare.
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> The relative significance of air quality versus economic growth may be a variable dependent upon regional conditions. For example, relatively minor deterioration of the

lations were published December 5, 1974, 39 Fed. Reg. 42509, and were amended slightly on January 16, 1975 (40 Fed. Reg. 2802), June 12, 1975 (40 Fed. Reg. 25004), and September 10, 1975 (40 Fed. Reg. 42011).

III. The Regulations

In promulgating final regulations[8] EPA was concerned primarily with the meaning of "significant deterioration." As it stated in the discussion preceding the new regulations:

> Most of the comments implicitly recognized that there is a need to develop resources in presently clean areas of the country, and that significant deterioration regulations should not preclude all growth, but should ensure that growth occurs in an environmentally acceptable manner. However, there are some areas, such as national parks, where any deterioration would probably be viewed as significant. A single nationwide deterioration increment would not be able to accommodate these two situations.

39 Fed. Reg. at 42520. The solution was to prescribe, for those areas with air cleaner than the national stand-

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aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air." Conversely, in areas with severe unemployment and little recreational value, the same level of deterioration might very well be considered "insignificant" in comparison to the favorable impact of new industrial growth with resultant employment and other economic opportunities. Accordingly, the definition of what constitutes significant deterioration must be accomplished in a manner to minimize the imposition of inequitable regulations on different segments of the Nation.

Id. at 18987, 18988.

[8] "Prevention of Significant Air Quality Deterioration," 39 Fed. Reg. 42510 (Dec. 5, 1974).

ards, three classes of allowable total increments above the levels of particulate matter and sulfur dioxide pollution as of January 1, 1975, with the intention that each area could determine which class would prevent significant deterioration of its air in light of the area's air quality and social and economic needs and objectives:

> Class I applie[s] to areas in which practically any change in air quality would be considered significant; Class II applie[s] to areas in which deterioration normally accompanying moderate well-controlled growth would be considered insignificant; and Class III applie[s] to those areas in which deterioration up to the national standards would be considered insignificant.
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> • • • •
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> Since the consideration of "air quality factors" alone essentially leads to an arbitrary definition of what is "significant," this term only has meaning when the economic and social implications are analyzed and considered. Therefore, the Administrator believes that it is most important to recognize and consider these implications, since the consideration of air quality factors alone provides no basis for selecting one deterioration increment over another.

Id. The regulations, 40 C.F.R. §§ 52.01(d), (f), and 52.21 (1975), were promulgated as amendments to the disapproved state implementation plans.[9]

All areas initially are designated Class II,[10] and may be redesignated by proposal of a state, federal land manager, or Indian governing body where the state has

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[9] Part 52 of 40 C.F.R. "sets forth the Administrator's approval and disapproval of State plans and the Administrator's promulgation of such plans or portions thereof." 40 C.F.R. § 52.02(a) (1975). Each state implementation plan has been amended to incorporate by reference the new regulations. *See, e.g.*, 40 C.F.R. §§ 52.96 (Alaska), 52.144 (Arizona), 52.181 (Arkansas).

[10] 40 C.F.R. § 52.21(c)(3)(i) (1975).

not assumed jurisdiction over Indian lands.[11] Federal land may be designated only to a more restrictive classification than that provided by the state(s) in which it is located.[12]

A state may redesignate if a hearing is held after notice to states, federal land managers, and Indian governing bodies that may be affected,[13] and if the proposed redesignation is based on the record of the hearing,

> which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the areas being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.[14]

A redesignation is to be approved if the state has complied with the listed requirements, has not "arbitrarily and capriciously disregarded" the considerations listed in the passage quoted above, and has undertaken the new source review requirements of Sections 52.21(d) and (e), discussed below.[15] 40 C.F.R. § 52.21(c)(3)(vi)(*a*) (1975).[16] Federal land managers and Indian gov-

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[11] 40 C.F.R. §§ 52.21(c)(3)(ii), (iii), (iv), (v) (1975).

[12] 40 C.F.R. § 52.21(c)(iv) (1975).

[13] 40 C.F.R. §§ 52.21(c)(3)(ii)(*a*)-(*c*) (1975).

[14] 40 C.F.R. § 52.21(c)(3)(ii)(*d*) (1975).

[15] *See* discussion at notes 20-23 *infra*.

[16] In the event of a protest by a state or Indian governing body to a redesignation proposed by another state, federal land manager, or Indian governing body, the Administrator may approve the proposal "only if he determines that in his judgment the redesignation appropriately balances considerations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and

erning bodies are subject to requirements parallel to those imposed on the states, with the added requirement that they consult with the state(s) in which they are located.[17]

If an area is designated as Class I or II, the allowable incremental pollution is measured from January 1, 1975.[18] No increments are specified for Class III; areas so designated are required to meet only the national secondary standards.[19]

Enforcement of the limitation on incremental pollution is accomplished partly through preconstruction review of 19 categories of stationary sources considered to be significant sources of pollution.[20] Permission to construct or to modify significantly one of the listed stationary sources is conditioned on a showing that the source's emissions, together with all other increases or decreases in emissions in the area since January 1, 1975, will not

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upon other areas and States; and any impacts upon regional or national interests." 40 C.F.R. § 52.21(c)(3)(vi)(*e*) (1975).

[17] 40 C.F.R. §§ 52.21(c)(3)(iv), (v) (1975).

[18] 40 C.F.R. § 52.21(c)(2)(i) (1975). The increments are prescribed in the following table, included in the cited subsection:

Pollutant	Class I (ug/m³)	Class II
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

[19] 40 C.F.R. § 52.21(c)(2)(ii) (1975).

[20] 40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975).

violate the air quality increments applicable to *any* area.[21] The source also must meet an emission limit, specified by the Administrator, "which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide." [22] Preconstruction review of new proposed sources will be conducted by the Administrator or, by delegation, by the individual states.[23]

Last, it should be noted that the described classification scheme is no procrustean bed to which all states are to be bound. The states retain the option of proposing an alternative method of preventing significant deterioration of air quality, thereby abandoning the regulatory framework described by the regulations under review. As EPA stated in proposing regulations:

> The State plans need not be identical to the regulations proposed herein, but should be developed to accommodate more appropriately individual conditions and procedures unique to specific State and local areas. States are urged to develop and submit individual plans as revisions to State Implementation Plans as soon as possible. When individual

[21] 40 C.F.R. § 52.21(d)(2)(i) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[22] 40 C.F.R. § 52.21(d)(2)(ii) (1975). "Best available control technology" is defined as equivalent to the new source performance standards promulgated under § 111 of the Clean Air Act, 42 U.S.C. § 1857c-6. *See* discussion at note 1 *supra*. If no standard of performance has been promulgated for a source, best available control technology is determined on a case-by-case basis. 40 C.F.R. § 52.01(f) (1975).

[23] 40 C.F.R. § 52.21(f) (1975). *See also* 40 C.F.R. § 52.21(d)(4) (1975), which provides for cooperation between the Administrator and federal land managers for review of new sources on federal land, and between the Administrator and the Secretary of the Interior as to lands over which a state has not assumed jurisdiction.

> State Implementation Plan revisions are approved as adequate to prevent significant deterioration of air quality, the applicability of the regulations proposed herein will be withdrawn for that State.

39 Fed. Reg. at 31000 (August 27, 1974).

IV. Standard of Review

It is well settled that EPA rulemaking is reviewed under Section 10 of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)-(D) (1970). *Ethyl Corp. v. EPA*, —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 66-74 (No. 73-2205, decided March 19, 1976). We must determine whether the Agency's action, findings, and conclusions are invalid as procedurally defective (§ 706(2)(D)), in excess of legislative authority (§ 706(2)(C)), unconstitutional (§ 706(2)(B)), or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)).

The "arbitrary and capricious" standard requires that agency action be affirmed if a rational basis exists therefor [24]; it is not for us to inquire into whether the decision is wise as a matter of policy, for that is left to the discretion and developed expertise of the agency.[25] The Supreme Court has cautioned, with respect to review under the "arbitrary and capricious" standard, that the reviewing court is limited to deciding whether there has been a "clear error of judgment * * *. Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park*

[24] *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 290 (1974).

[25] *National Ass'n of Food Chains, Inc. v. ICC*, —— U.S. App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 13 (No. 75-1471, decided May 18, 1976) (*per curiam*).

v. Volpe, 401 U.S. 402, 416 (1972). *See Ethyl Corp. v. EPA, supra*, —— U.S.App.D.C. at —— n.74, —— F.2d at —— n.74, slip op. at 69 n.74.

We therefore must assure ourselves that the Agency has presented a rational basis for its decision[26]; that it "demonstrably has given reasoned consideration to the issues, and has reached a result which rationally flows from its conclusions."[27]

V. ARGUMENT

A. Should *Sierra Club v. Ruckelshaus* be rejected on further consideration?

The question whether the Clean Air Act should be interpreted to prohibit significant deterioration of air cleaner than the national standards is necessarily the first level of analysis. Although this issue was decided by the earlier *Sierra Club v. Ruckelshaus* litigation, it is contended by the industrial petitioners (1) that the decision was clearly wrong on the merits and should be reconsidered, and (2) that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are inconsistent with the prior decision in *Sierra Club v. Ruckelshaus*.

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[26] We note that the basis of agency action must be provided *by the agency*; an order "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding * * *." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see National Ass'n of Food Chains, Inc. v. ICC, supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip. op. at 12-13.

[27] *National Ass'n of Food Chains, Inc. v. ICC, supra* note 25, —— U.S.App.D.C. at ——, —— F.2d at ——, slip op. at 14.

The first argument obviously would require the clearest showing that *Sierra Club v. Ruckelshaus* was incorrectly decided, since Judge Pratt's decision was affirmed by both another panel of this court and an equally divided Supreme Court. It is posited that neither the "protect and enhance" language of Section 101(b)(1) nor the legislative history of the Clean Air Act need be read to impose a requirement of nondeterioration; petitioners then point out that, to the contrary, a 1970 amendment to the Act, Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2), states that the Administrator "shall approve" a state implementation plan which meets the criteria listed in that section, none of which implies a nondeterioration standard. The conclusion advanced by petitioners is that the judicially-created requirement of nondeterioration violates this plain language of the 1970 amendment.

When a specific provision of a total statutory scheme reasonably may be construed to be in conflict with the congressional purpose expressed in the act, our first task is to examine the act's legislative history to determine whether the specific provision is reconcilable and consistent with the intent of Congress.[28] We find, in the legislative history of the Clean Air Act of 1970, a clear understanding that the Act embodied a pre-existing policy of nondeterioration of air cleaner than the national standards. Inasmuch as we find no support for the proposition that the addition of Section 110(a)(2) was intended to limit that policy in any way, we reaffirm our prior holding in *Sierra Club v. Ruckleshaus*.

The "protect and enhance" language of the Clear Air Act was added by the Air Quality Act of 1967, 81 STAT.

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[28] *See FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968): "[W]e cannot, in the absence of an unmistakable directive, construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."

485.[29] The administrative interpretation and, to a lesser degree, the legislative history of the Air Quality Act expressed a policy of nondeterioration,[30] and that policy appears generally to have been accepted at the time of the addition of the Clean Air Act amendments of 1970.

In the Senate hearings on the Clean Air Act amendments of 1970, the officials charged with implementation of the 1967 Act expressed their clear understanding that

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[29] *Air Quality Act of 1967*, S. Rep. No. 91-403, 90th Cong., 1st Sess. 40 (1967).

[30] *Sierra Club v. Ruckelshaus*, 344 F.Supp. 253, 255 (D. D.C. 1972); ENVIRONMENTAL LAW INSTITUTE, FEDERAL ENVIRONMENTAL LAW, 1974 at 1077-1080. The Senate committee report on the Air Quality Act emphasized that the Act would apply to all areas of the country, and quoted Senator Muskie for the proposition that it was necessary "to assure the lessening of current levels of pollution and to prevent further environmental deterioration in the future." *Air Quality Act of 1967, supra* note 29, at 2-3, 8.

The Act was administered by the National Air Pollution Control Administration of the Department of Health, Education and Welfare, which formalized the concept of nondeterioration in its Guidelines for the Development of Air Quality Standards and Implementation Plans, Part I, § 1.51 at 7 (1969):

> "[A]n explicit purpose of the Act is "to *protect* and *enhance* the quality of the Nation's air resources" (emphasis added). Air quality standards which, even if fully implemented, would result in significant deterioration of air quality in any substantial portion of an air quality control region clearly would conflict with this expressed purpose of the law.

See generally, Non-Degradation—Clean Air Act and Amendments Held to Mandate a Policy Prohibiting Significant Deterioration of Air Quality in Areas of Relatively Clean Air, 2 FORDHAM URBAN L. J. 136 (1973) (hereinafter *Clean Air Act Held to Prohibit Significant Deterioration*); *The Clean Air Act and the Concept of Non-Degradation: Sierra Club v. Ruckelshaus*, 2 ECOLOGY L. Q. 801 (1971) (hereinafter *The Concept of Non-Degradation*).

the "protect and enhance" language of Section 101 mandated the policy of nondeterioration. HEW Secretary Robert H. Finch testified as follows in a statement presented by Undersecretary John Veneman:

> In their implementation plans, the States would have to spell out the measures to be taken to achieve and preserve national air quality standards. As I have indicated, they would have the option of designing their implementation plans to achieve or preserve higher than national quality levels, if they wished to do so.
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> As you know, one of the express purposes of the Clean Air Act is "to protect and enhance the quality of the Nation's air resources" • • •. Accordingly, it has been and will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with this provision. We shall continue to expect States to maintain air of good quality where it now exists.

Air Pollution—1970, Hearings before the Subcommittee on Air and Water Pollution of the Senate Committee on Public Works, Part I, 132-133 (1970). Undersecretary Veneman went on to state that "[i]t will continue to be our view that implementation plans that would permit significant deterioration of air quality in any area would be in conflict with the provisions of the Act. We do not intend to condone 'backsliding.' If an area has air quality which is better than the national standards, they would be required to stay there and not pollute the air ever further, even though they may be below national standards." *Id.* at 143.

The Senate committee report gave express recognition to the concept of nondeterioration, directing that

> [i]*n areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementa-*

> *tion plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality.* Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative.

S. Rep. No. 91-1196, 91st Cong., 2d Sess. 11 (1970) (emphasis added). Quite to the contrary, however, there was no particular significance ascribed to the "shall approve" language of the section which became Section 110(a)(2). *Id.* at 11-15.

The explanation of this omission in the legislative history appears to be that the 1970 amendments were aimed at states that refused to take action to improve their air quality. The background of the 1970 amendments was described in *Train v. NRDC, supra,* 421 U.S. at 64:

> The response of the States to these manifestations of increasing congressional concern with air pollution was disappointing. Even by 1970, state planning and implementation under the Air Quality Act of 1967 had made little progress. Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970 * * *

The "stick" was the group of express requirements as to the content of state implementation plans.[31] The

[31] "The Committee recognized that because the proposed bill would require a great deal in a short period of time and because the brevity of the provision in existing law has led to uneven and inadequate interpretation, the character of an implementation plan must be specified and the alternative methods of achievement listed. The Committee bill would require that a rigorous time sequence be met in the development of the implementation plan and would provide for the substitution of Secretarial authority if the State plan, or a portion thereof, is inadequate to attain the quality of ambient air established by the nationally promulgated ambient air quality standard." S. Rep. No. 91-1196, 91st Cong., 2d Sess. 12 (1970).

"shall approve" language was addressed to the administrative problems that would be caused by a requirement that all states submit complying implementation plans within a limited time; the provisions of Section 110(a) are, more than anything else, a summary of the mandatory requirements for all state implementation plans.[32] We have, however, found no indication, nor have we been cited to any indication in the legislative history, that Section 110 was intended in any way to vitiate the nondeterioration mandate contained in the Senate report.[33]

This court has recently cautioned that a failure by Congress expressly to reject the administrative construction of an act need not, without more, indicate congressional acquiescence in the agency interpretation.[34] In

[32] *See* note 31 *supra.*

[33] *See The Concept of Non-Degradation, supra* note 30, at 819:

> The legislative history does support the contention that the principle of non-degradation is implicit in the Clean Air Act. It resolves the vagueness of both the purpose clause and section 110. Although the history of the 1967 Act conveys an ambiguous picture of the legislative intent, the history of both the 1970 Amendments and the later Implementation Hearings clearly indicates that Congress confronted the complexities of air pollution control and undertook a program designed to prevent the deterioration of clean air.

[34] *Chisholm v. FCC,* —— U.S.App.D.C. ——, ——, —— F.2d ——, ——, slip op. at 26 (No. 75-1951, decided April 12, 1976):

> We begin by noting that attributing legal significance to Congressional inaction is a dangerous business * * *. The Supreme Court has said that Congressional failure to repudiate particular decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice, *Zuber v. Allen,* 396 U.S. 168, 185-86 n. 21 (1969), and "affords the most dubious foundation for drawing positive inferences," *United States v. Price,* 361 U.S. 304, 310-11 (1960) (Harlan, J.).

Chisholm v. FCC, —— U.S. App.D.C. ——, —— F.2d —— (No. 75-1951, decided April 12, 1976), the court refused to ascribe significance to congressional inaction when it appeared that Congress was "aware" of the administrative interpretation only "in a technical sense." —— U.S. App.D.C. at ——, —— F.2d at ——, slip op. at 27. We are not presented with that situation. Not only was the Agency's interpretation of the Air Quality Act of 1967 as mandating prevention of significant deterioration clearly before the Congress in 1970, but the committee reports contain express language that the principle of nondeterioration was preserved by the Clean Air Act Amendments of 1970.

This sort of express congressional recognition of the implementing agency's statutory construction can be extremely significant in interpreting legislative intent. In *NLRB v. Bell Aerospace Co,*, 416 U.S. 267 (1974), for instance, the Court found approval of a long-standing administrative interpretation in Congress' studied inaction:

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has re-enacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.

416 U.S. at 274-275. The Court reached similar results in *Zemel v. Rusk*, 381 U.S. 1, 11 (1965) (administration of Passport Act of 1926); *C.I.R. v. Estate of Noel*, 380 U.S. 678, 682 (1965); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 365-366 (1951); *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U.S. 110, 114-225 (1939); and *Norwegian Nitrogen Co. v. United States*, 288 U.S. 294, 313 (1933), among others.

In the instant case there is every indication that Congress intended in 1970 to continue a policy of prevention of significant deterioration of air quality. In addition, we find nothing in the legislative history to indicate that Congress had any desire or intention that the 1970 amendments hinder the fight against air pollution by voiding the principle of nondeterioration.

It is significant in this regard that recent congressional statements have supported the historic existence of a requirement of nondeterioration. The report of the House Committee on Interstate and Foreign Commerce on the proposed Clean Air Act Amendements of 1976 (H.R. Rep. No. 94-1175, May 15, 1976) endorses a new statutory definition of nondeterioration, commenting that "[t]he Committee has developed this section to provide clearer definition of the nearly decade-old policy (reflected in section 101(b) of the Act) that significant deterioration of clean air must be avoided, and to provide more specific congressional guidance as to how this policy is to be implemented." *Id.* at 83. A contemporaneous report of the Senate Committee on Public Works on similar proposed amendments has both restated the language quoted above from the 1970 Senate report [35] and reaffirmed the continuing policy of nondeterioration:

> A nondegradation policy was articulated first in Federal water pollution law. That was in 1965. The concept was incorporated into the 1967 Air Quality Act, which stated that a basic purpose of the Act was to "protect and enhance the quality of the Nation's air resources." That language was not altered by the 1970 Clean Air Amendments. This bill clarifies and details that policy.

Clean Air Amendments of 1976, S. Rep. No. 94-717 at 20 (March 29, 1976). It would fly in the face of overwhelming evidence of legislative intent to hold that the

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[35] *See* pp. 21-22 *supra*.

Clean Air Act does not contain a requirement of prevention of significant deterioration.

Our belief that *Sierra Club v. Ruckelshaus* was decided properly is bolstered by its acceptance in a number of other circuits.[36] Petitioners suggest, however, that the later decision in *Train v. NRDC*, 421 U.S. 60 (1975), and enactment of the Energy Supply and Environmental Coordination Act of 1974, 88 STAT. 246, are necessarily inconsistent with the concept of nondeterioration of air quality. We reject both contentions.

Train v. NRDC involved construction of the "shall approve" language of Section 110(a)(3)(A),[37] which requires that the Administrator approve revisions of state plans which, after revision, meet the criteria of Section 110(a)(2). The Court held that state action which grants a variance to an individual pollution source must be approved by the Administrator if the approval will not expand the time for compliance with national primary ambient air quality standards[38] or otherwise

[36] *See NRDC v. EPA*, 489 F.2d 390, 408 (5th Cir. 1974), *rev'd on other grounds, sub nom. Train v. NRDC*, 421 U.S. 60 (1975); *Big Rivers Electric Corp. v. EPA*, 8 ERC 1092 (6th Cir. 1975); *Union Electric Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), *aff'd on other grounds*, —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976); *NRDC v. EPA*, 507 F.2d 905, 913 (9th Cir. 1974). *Cf. Highland Park v. Train*, 519 F.2d 681, 685 (7th Cir. 1975).

[37] "The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph 2 [§ 110(a)(2)] and has been adopted by the State after reasonable notice and public hearings." Section 110(a)(3)(A), 42 U.S.C. § 1857c-5(a)(3)(A) (Supp. IV 1974).

[38] Section 110(a)(2)(A), 42 U.S.C. § 1857c-5(a)(2)(A) (1970):

> The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

[continued]

violate the requirements of Section 110(a)(2). In the following passage, strongly pressed upon us by petitioners, the Court emphasized the mandatory language of Section 110(a)(2):

> The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § 110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.

421 U.S. at 79 (emphasis in original).[39] It is argued that this decision removes from the Administrator the dis-

> (A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but * * * in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained[.]

[39] The language was repeated in *Hancock v. Train*, —— U.S. ——, ——, 44 U.S. L. WEEK 4767, 4768 (June 7, 1976) (dictum), which concerned the obligation of federal facilities

cretion to disapprove a plan which complies with Section 110(a)(2), and therefore requires that *Sierra Club v. Ruckleshaus* be overturned. This argument, however, is subject to the same analysis by which we reject the argument based on Section 110(a)(2) alone. Unlike the instant case, *Train* was concerned with air pollution below the national standards, and the question was whether individual variances would prevent the states from achieving the standards within the prescribed time limits. The Supreme Court in *Train* did not consider the issue of nondeterioration, even though the decision below was based in part on *Sierra Club v. Ruckleshaus.*[40] Rather than assume, as the industrial petitioners would have us, that *Train* silently overturned the earlier divided affirmance in *Sierra Club*, we find it more reasonable to conclude that the Court did not address the issue, and we reject the argument based on *Train.*

In another recent decision, *Union Electric Co. v. EPA*, —— U.S. ——, 44 U.S. L. WEEK 5060 (June 25, 1976), the Supreme Court found challenges to state implementation plans based on economic infeasibility to be barred by the mandatory nature of Section 110(a)(2). The Court found in the legislative history of the 1970 amendments a congressional determination that clean air objectives should take precedence over claims of economic or technological infeasibility:

> As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise unchecked problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the

to comply with the requirements of state implementation plans.

[40] *NRDC v. EPA, supra* note 36, 489 F.2d at 408. The *Train* decision was limited expressly to the question of approval of variances. 421 U.S. at 69-70.

> States, but nonetheless subject * * * the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," *Train* v. *NRDC*, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
>
> This approach is apparent on the face of § 110(a)(2). The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified, *Train* v. *NRDC*, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological infeasibility.

—— U.S. at ——, 44 U.S. L. WEEK at 5063. Although the Court stressed the "shall approve" language of Section 110(a)(2), its construction was founded on a concern that the congressional mandate of prompt implementation of pollution control plans not be disserved. The Court was not presented with the distinct question whether the "shall approve" language of Section 110(a)(2) must be read to subvert the concomitant congressional directive that significant deteriation of air cleaner than the national standards be prevented.[41] Thus, despite the emphasis placed on (a)(2) by the opinions in *Train v. NRDC* and *Union Electric*, we do not believe the result in the instant case is controlled by either opinion.

Petitioners also rely on the Energy Supply and Environmental Coordination Act of 1974 (ESECA), which

[41] As was the case in *Train v. NRDC*, the lower court in *Union Electric* expressly had approved the concept of prevention of significant deterioration. *Union Electric Co. v. EPA, supra* note 36, 515 F.2d at 220 n.39. The Supreme Court affirmed the Court of Appeals without mentioning that issue.

was enacted to encourage stationary fuel-burning sources to convert from oil to coal, to minimize the nation's dependence on imported oil. Among other things, it (1) authorized the Federal Energy Administration to require power plants and other major fuel-burning sources to burn coal, (2) amended the Clean Air Act to provide a limited exemption from stationary source requirements to those converting facilities,[42] and (3) required the Administrator of EPA to review the implementation plan of each state and notify any state which could revise its plan as to stationary fuel-burning sources without violating the national ambient air quality standards.[43] The ESECA is accommodated in the "significant deterioration" regulations by 40 C.F.R. § 52.21(d)(1), which exempts from preconstruction review modifications "to utilize an alternative fuel, or higher sulfur content fuel."

Although conversion to "dirtier" fuels such as coal certainly will impair both improvement and maintenance of air quality, there is no reason to believe that passage of ESECA was intended to eliminate the requirement of nondeterioration.[44] The amendment was a necessary response to the nationwide shortage of oil and natural gas,

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[42] Section 119, 42 U.S.C. § 1857c-10 (Supp. IV 1974).

[43] Section 110(a)(3)(B), 42 U.S.C. § 1857c-5(a)(3)(B) (Supp. IV 1974).

[44] The "purpose" section of ESECA, 15 U.S.C. § 791 Supp. IV 1974), is as follows:

> The purposes of this chapter are (1) to provide for a means to assist in meeting the essential needs of the United States for fuels, *in a manner which is consistent, to the fullest extent practicable, with existing national commitments to protect and improve the environment,* and (2) to provide requirements for reports respecting energy resources.

(Emphasis added.)

and no reason has been presented for ascribing to it a greater significance.[45]

We therefore find no substantial reason to question, under ESECA or *Train*, the continuing validity of *Sierra Club v. Ruckleshaus*, and we proceed to the substance of the regulations under review using that decision as our guide.

B. Are the regulations invalid on the ground that only two of the six primary air pollutants are considered?

The regulations provide for control only of particulate matter and sulfur dioxide emissions,[46] whereas the Administrator also has identified carbon monoxide, nitrogen oxides, hydrocarbons, and photochemical oxidents as air pollutants which have an adverse effect on public health or welfare.[47] It is contended that the regulations violate the District Court's order in *Sierra Club v. Ruckleshaus* by failing to prevent significant deterioration of air quality with respect to those four pollutants.[48]

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[45] We also reject the argument that it is "unfair" to count the increased emissions from a source that is converted to coal against the allowable pollution increment for the area, since that modification is exempted from preconstruction review. We see no reason why a state in which major utilities have been forced to convert to coal may not choose to impose commensurately stricter standards on the remainder of the area.

[46] *See* note 18 *supra.*

[47] 40 C.F.R. §§ 50.8-50.11 (1975).

[48] The order required that the Administrator "prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972).

EPA has responded that the interrelationships among those four pollutants, and the relationships between incremental increases in those pollutants and deterioration of air quality, are poorly understood and cannot be determined with any reasonable degree of accuracy:

> These [four pollutants] are commonly referred to as "automotive pollutants," because the automobile is the major source of each of them * * *. The first three (HC, NO_2, and O_x) are also known as "photochemical" or "reactive" pollutants, because under the influence of sunlight, they enter into a complex chemical reaction in the atmosphere. * * * The rate at which the reaction occurs depends on a number of variables, including temperature, humidity, solar intensity, and the concentrations of the input pullutants. * * *
>
> The chief reason for excluding photochemical pollutants from these regulations is that the relationship between the emission of HC and oxides of nitrogen, on the one hand, and the resulting ambient levels of the harmful pollutants O_x and NO_2, on the other, is very poorly understood. The only method for relating emissions to air quality for these pollutants is the "area-wide proportional model." This model assumes, as its name suggests, that ambient pollutant levels are proportional to total emissions. The model is useful only in areas where ambient pollutant levels are substantial and well-monitored, as in urban areas with smog problems. * * * But the proportional model cannot be used to regulate air quality deterioration in clean-air areas. This is because the assumptions underlying the model do not hold in clean-air areas, and also because it is not possible to make accurate measurements of ambient levels of photochemical pollutants that are substantially below the levels of the national standards.

Br. for respondent at 32-33 (footnote omitted), *elucidating*, 39 Fed. Reg. 31006 (August 27, 1974); 39 Fed.

Reg. 42511 (December 5, 1974); *Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality*, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards (January 1975), at 21-27 (JA 117-123). EPA concluded that existing technology "is inappropriate for analyzing the incremental impact of individual new sources" with respect to the four "automotive pollutants," and that "[a]t this time, the only practical approach for dealing with these pollutants appears to be to minimize emissions as much as possible." 39 Fed. Reg. 42511 (December 5, 1974). EPA further has contended that ongoing programs toward reduction of automotive emissions "are adequate to prevent any significant deterioration due to sources of carbon monoxide, hydrocarbons or nitrogen oxides." [49]

Petitioners have emphasized that the four omitted pollutants can have extremely adverse effects on public health and welfare, and have noted that they are emitted by stationary sources as well as by moving vehicles. Petitioners have not, however, directly clashed with EPA's contention that it does not have technology or modeling techniques rationally to regulate emissions on a case-by-case basis. This is the type of policy decision in which the Agency's developed expertise is heavily implicated, and with which the court will not tamper so long as the decision was rational and based on consideration of the relevant factors. *Ethyl Corp. v. EPA*, *supra*, —— U.S. App.D.C. at ——-——, —— F.2d at ——-——, slip op. at 66-74. Given the absence of any direct denials of EPA's assertions on this point, the Agency is entitled to claim the presumption of validity which attends its actions. *Id.*, slip op. at 68. We therefore hold that EPA did not act unlawfully in excluding from its regulations the four "automotive pollutants."

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[49] 39 Fed. Reg. 31006 (Aug. 27, 1974).

C. Are Class II and Class III invalid as permitting significant deterioration of air quality?

D. Is it unlawful to make determinations as to permissible air quality deterioration on the basis of considerations other than air quality?

It is argued by Sierra Club that Classes II and III, by permitting increases in sulfur dioxide and particulate matter pollution to levels which in some areas may be many times present concentrations, allow significant deterioration of air quality. The "significance" is primarily a matter of the numbers involved; although evidence has been presented that levels of pollution below the national secondary standards may have adverse health effects,[50] it is for the Administrator rather than the courts to determine that the national secondary standards no longer can be said to protect the public from "any known or anticipated adverse effects" of a pollutant. The question of significance thus leads by implication to a second line of argument—that it is unlawful to consider deterioration of air quality "insignificant" simply because it accompanies normal, controlled economic development.

EPA recognized, in developing the concept of "significant deterioration" pursuant to Judge Pratt's order, that "[p]ending the development of adequate scientific data on the kind and extent of adverse effects of air pollutant levels below the secondary standards, significant deterioration must necessarily be defined without a direct quantitative relationship to specific adverse effects on public health and welfare." 39 Fed. Reg. 18987 (July 16, 1973). It therefore determined that each state must

[50] Br. for petitioners Sierra Club *et al.*, No. 74-2063, at 18-20. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

determine what level of incremental pollution, taking into account the air quality and social and economic needs and objectives of the area, would be "significant deterioration" of its air quality.[51]

In that context, it was a rational policy decision that the significance of deterioration of air quality should be determined by a qualitative balancing of clean air considerations against the competing demands of economic growth, population expansion, and development of alternative sources of energy. The approach provides a workable definition of significant deterioration which neither stifles necessary economic development nor permits unregulated deterioration to the national standards.[52] We therefore find that EPA acted within the discretion it is granted as to matters of policy [53] in choosing this design to prevent significant deterioration of air quality.

We may state our belief, as a general overview at this point, that for the most part it somewhat misses the mark to raise objections to the specific emission limits of the regulations under review. EPA has emphasized that the individual states are free to conceive and adopt their own methods of preventing significant deterioration. A state may use EPA's system to classify itself as industrial-metropolitan (Class III), as anticipating

[51] *See* pp. 12-13 *supra*.

[52] EPA acknowledges that all states theoretically could reclassify to Class III, thereby permitting unregulated deterioration to the national standards. It asks that the states not "arbitrarily and capriciously" disregard its outlined considerations before redesignating areas. 40 C.F.R. § 52.21(c)(3)(vi)(*a*).

[53] "However formal the type of agency proceeding, an agency's policy choices are reviewed under the arbitrary and capricious standard, which asks merely whether the policy choice is rationally connected to its factual basis." *Judicial Review of the Facts in Informal Rulemaking: A Proposed Standard*, 84 YALE L. J. 1750, 1751 (1975).

normal economic growth (II), or as desirous of protecting its clean air (I). But it also may develop its own scheme, based on its own needs, so long as the regulatory structure prevents significant deterioration of air cleaner than the national standards. Given the broad power vested in the states to alter or amend these regulations, we find little merit in objections to the specifics of the classification scheme itself.

E. Has the effective date of the regulations been postponed unlawfully beyond the date contemplated by the Clean Air Act?

The Clean Air Act of 1970 imposed a series of time limits for the various steps leading up to approval of state implementation plans. Under that timetable regulations should have become effective by the middle of 1972.[54]

The regulations employ two later effective dates. First, emissions increments are measured from a January 1, 1975 baseline, and all sources for which "approval" is given after that date will have their emissions counted against the allowable increment for the region. 40 C.F.R. § 52.21(d)(2)(i) (1975). Second, preconstruction review is provided only for sources which have "not

[54] The Clean Air Act Amendments of 1970 were added on Dec. 31, 1970, 84 STAT. 1677. The Administrator was given 90 days in which to propose and promulgate national primary and secondary ambient air quality standards. Section 109(a)(1)(B), 42 U.S.C. § 1857c-4(a)(1)(B). The states then were given nine months to submit proposed implementation plans to the Administrator, § 110(a)(1), 42 U.S.C. § 1857c-5(a)(1), and the Administrator had four months to approve or disapprove the plans. Section 110(a)(2), 42 U.S.C. § 1857c-5(a)(2). The Administrator was to "promptly prepare and publish" implementation plans for states which failed to submit a complying plan or which failed to revise a plan after 60 days notice. Section 110(c), 42 U.S.C. § 1857c-5(c). The target date for effectiveness of state implementation plans was therefore mid-1972.

commenced construction or modification prior to June 1, 1975." 40 C.F.R. § 52.21(d)(1) (1975). "'Commenced' means that an owner or operator has understaken a continuous program of construction or modification or that an owner or operator has entered into a contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification." 40 C.F.R. § 52.21(b)(7) (1975). *Compare* 40 C.F.R. § 52.01(b) (1975). All later-commenced source construction must be reviewed for compliance with new source performance standards and for a determination that construction will not cause the pollution increments of any area to be violated. 40 C.F.R. § 52.21(d)(2) (1975), *as amended*, 40 Fed. Reg. 42011 (September 10, 1975).

We are asked to hold that sources for which construction was commenced after mid-1972 must be counted against the allowable pollution increments for the various regions. EPA answers that inclusion of the earlier construction would limit practical use of the regulations to regulate future development. We accept the latter position. Whatever the effect of past construction has been upon present pollution, each state must determine what will be appropriate for future air quality and economic development. So long as any state may choose to limit future development to compensate for excessive past pollution, the choice of starting dates for the applicability of the regulations appears to be irrelevant.[55] For the same reason we do not believe EPA acted unreasonably in failing to count increases in pollution since 1972 against the allowable increments. It was a rational policy

[55] Similarly, we find no ground for objection to the manner in which EPA has defined commencement of construction. 40 C.F.R. § 52.21(b)(7) (1975). Even if a source on which construction has "commenced" is not subject to preconstruction review, its emissions may be considered in choosing the appropriate pollution increment to be applied to the area.

decision to limit the instant regulations to prospective concerns only.

F. Is it arbitrary and capricious to review proposed construction of stationary sources on the basis of compliance with the New Source Performance Standards, rather than on the basis of Best Available Control Technology on a case-by-case basis?

G. Was the Administrator required to provide for preconstruction review of all sources, rather than for "significant" sources only?

40 C.F.R. § 52.21(d)(ii) (1975) requires that new sources which are subject to preconstruction review meet the level of emissions that would be achieved by application of the Best Available Control Technology (BACT); Section 52.01(f) defines BACT as equivalent to the New Source Performance Standards (NSPS) promulgated under Section 111 of the Clean Air Act, 42 U.S.C. § 1857c-6 (1970), *amended* (Supp. IV 1974), when those standards are available. If no NSPS has been established for a category of sources, preconstruction review of emission reduction systems is done on a case-by-case basis. 40 C.F.R. §§ 52.21(d)(2)(ii), 52.01(f) (1975). The Sierra Club posits that the NSPS guidelines, defined by Section 111 as "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated," are a "lowest common denominator"-based group and are inconsistent with the policy of nondeterioration.

We accept EPA's response that case-by-case review of all new sources would not only be unworkable, but would undermine Section 111 by limiting its application of NSPS to those areas which have not yet achieved the national secondary standards. It appears, in addition, that application of NSPS rather than BACT will not of

necessity lead to more total pollution; a given area still is limited to the specified increment for its classification, and the use of a less effective emission reduction system by one new statutory source will simply use up more of the allowable increment and limit opportunities for other proposed new sources. This trade-off, between types of control systems and opportunities for new source construction, is best left to the states, which by delegation will administer the preconstruction review. As the Supreme Court held in *Train v. NRDC*, *supra*, "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79. We therefore hold that the use of NSPS is rational and in accord with the Clean Air Act.

An additional challenge to the procedures for preconstruction review is based on the allegedly unlawful limitation of review to 19 specified categories of sources.[56]

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[56] The 19 listed categories are:

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
(ii) Coal Cleaning Plants.
(iii) Kraft Pulp Mills.
(iv) Portland Cement Plants.
(v) Primary Zinc Smelters.
(vi) Iron and Steel Mills.
(vii) Primary Aluminum Ore Reduction Plants.
(viii) Primary Copper Smelters.
(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
(x) Sulfuric Acid Plants.
(xi) Petroleum Refineries.
(xii) Lime Plants.
(xiii) Phosphate Rock Processing Plants.
(xiv) By-Product Coke Oven Batteries.
(xv) Sulfur Recovery Plants.
(xvi) Carbon Black Plants (furnace process).

[continued]

We find this argument subject to the analysis presented above with respect to use of NSPS rather than BACT. Review of every new source of pollution clearly would be impossible since every gas- or oil-heated house is a source of some pollution. The decision to review only those sources which emit more than 25 pounds per hour of sulfur dioxide or particulate matter [57] does not mean there will of necessity be more total pollution; it means only that a large number of minor sources could use up the area's allowable increment and thereby preclude construction of new major sources of pollution. As EPA stated in a document explaining its regulations:

> The 18 categories which are covered by the regulation, except for fuel conversion plants, are the largest present emitters of SO_2 and TSP on a nationwide basis. Fuel conversion plants (coal gasification and liquefication, oil shale processing, etc.) were included due to their significant growth potential, particularly in presently clean areas * * *. The air quality impact of sources not included in the 18 categories is taken into account since the total air quality deterioration above the baseline is taken into account when an application to construct a new source of one of the 18 categories is reviewed.

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 27-28. Further, it is within the power of the various states to enact more stringent controls, and expanded preconstruction review procedures, should limited review lead to problems in regulating incremental pollution. We therefore hold that the regulations are not invalid insofar as provision is made for preconstruction review of only the specified categories of stationary sources.

H. Are the regulations arbitrary and capricious on the ground that the allowable increments are unrelated to anticipated adverse effects on public health and welfare?

The regulations under review establish a classification scheme which is not based on demonstrated adverse air quality effects, but rather on a balancing of concerns with air quality, economic and social needs and objectives, and development of energy sources. The industrial petitioners contend that EPA is not authorized to promulgate regulations which are not related to adverse air quality effects, and that Classes I and II therefore are invalid.

The need to prevent significant deterioration of air cleaner than the national standards, and the statutory authorization therefor, was settled by the *Sierra Club v. Ruckelshaus* litigation. It clearly is a rational legislative purpose to protect and enhance the quality of the

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(xvii) Primary Lead Smelters.
(xviii) Fuel Conversion Plants.
(xix) Ferroalloy production facilities commencing construction after October 5, 1975.

40 C.F.R. § 52.21(d)(1)(i)-(xix) (1975), *as amended*, 40 Fed. Reg. 42011 (Sept. 10, 1975).

[57] The standard of 25 pounds/hour of emissions for addition of new categories to the list of those subject to preconstruction review was proposed on June 9, 1975 (40 Fed. Reg. 24534) and adopted Sept. 10, 1975 (40 Fed. Reg. 42011):

> [T]he criteria the Administrator intends to use in adding further sources in the future * * * are:
>
> (1) a new source performance standard for sulfur dioxide (SO_2) or particulate matter has been established for the source or any facility of the source under Part 60 of this chapter, and (2) the established new source performance standard will allow any anticipated future plant affected by the standard to emit SO_2 or particulate matter in excess of 25 pounds per hour from the affected facility or facilities when operating at maximum design capacity.

The later notice also added the 19th category, Ferroalloy production facilities.

nation's air, even in the absence of quantified evidence of adverse effects.[58]

The District Court order in *Sierra Club v. Ruckelshaus* mandated that EPA enforce this legislative purpose by preventing significant deterioration of air quality, but left definition of "significant" to the Agency. EPA's solution was a definition created by its own implementation; each state's evaluation of the relative importance

[58] EPA emphasized in promulgating regulations that levels of pollution below the national standards still may have some adverse effects:

> Limitations on air quality that result in cleaner air than the national ambient air quality standards cannot * * * be based on any quantitative measure of harm to either public health or welfare. This is not, however, to say that there are no possible unquantified adverse effects on public health or welfare below the levels of the national standards. Examples of such unquantified effects involve the transformation of sulfur dioxide into suspended sulfates and sulfuric acid aerosols, resulting in possible effects on health, visibility, climatic changes, acidity of rain, and deterioration of materials.
>
> Since there is no way to relate "significance" of deterioration of air quality to any adverse effects resulting from air quality levels cleaner than the national standards, EPA concluded that the determination of what is "significant" deterioration must take into account factors other than air quality alone. For example, relatively minor deterioration of the aesthetic quality of the air may be very significant in a recreational area in which great pride (and economic development) is derived from the "clean air."

Technical Support Document—EPA Regulations for Preventing the Significant Deterioration of Air Quality, U.S. Environmental Protection Agency, Office of Air Quality Planning & Standards (January 1975), at 6. *See also Clean Air Act Amendments of 1976*, Report of the Senate Committee on Public Works, S. Rep. No. 94-717 at 19-27 (March 29, 1976); *Clean Air Act Amendments of 1976*, Report of the House Committee on Interstate and Foreign Commerce, H.R. Rep. No. 94-1175 at 83-116 (May 15, 1976).

of the competing interests which surround continued maintenance of air quality will determine what level of deterioration would be significant for that state. The three classifications thus are not intended to represent a scientific conclusion as to what constitutes significant deterioration; rather, they are suggested frameworks for use by the states after independent evaluation. Because the regulations do not purport to be mandatory requirements based on scientific research, they properly cannot be judged by asking whether the increments are related to demonstrated health effects. As we have noted above, any state could adopt even more stringent regulations by proposing its own revision to its implementation plan.[59]

We therefore find insubstantial the objection that the varying allowable increments presented in the instant regulations are unrelated to demonstrated adverse health effects. The regulations flow from a valid legislative goal, and we believe EPA has acted reasonably in permitting each state, in its informed discretion, to develop a workable definition of significant deterioration.

I. Are the regulations unworkable because present modeling techniques are inadequate to predict precisely how a new source will affect the ambient air?

Some petitioners[60] have objected that present computer modeling technology is inadequate to predict with precision what effect a proposed new source will have on the ambient air, and therefore on the allowable increment for a given region. EPA does not dispute the point as to the accuracy of existing techniques, but does argue that present diffusion modeling techniques, "while not corresponding to actual conditions in the ambient air,

[59] *See* pp. 16-17 *supra*.

[60] *See, e.g.*, br. of American Petroleum Institute *et al.* in No. 75-1665 at 38.

do provide a consistent and reproducible guide which can be used in comparing the relative impact of a source." 39 Fed. Reg. 31003 (August 27, 1974). So long as the method of measurement is consistent, it may be used as a reliable benchmark of the relative impact of different sources; EPA argues that it therefore is unnecessary to be able to guarantee with precision what effect a source will have.

We have no basis on which to question EPA's judgment as to its predictive techniques. Any consistent method of prediction can be adjusted in light of actual experience, and a state therefore may adjust its guidelines for future development on the basis of changes in the measured pollution levels over time. We cannot hold at this time, therefore, that lack of precision alone is a substantial objection to the methods which may be used to estimate the impact of a proposed source on actual levels of pollution.

J. Did EPA violate the Clean Air Act

(1) by not permitting submission of revised plans before promulgating regulations, or

(2) by not holding hearings in each state before promulgating the regulations?

The Administrator is required to prepare and publish his own implementation plan, or portion thereof, for a state if (a) the state fails to submit a plan as to any national standard, (b) the plan is not in accordance with the requirements of Section 110 of the Act, or (c) the state fails, within 60 days, to revise its plan pursuant to Section 110(a)(2)(H), which requires that implementation plans provide for revisions (i) to take account of changes in technology or (ii) if the Administrator determines that the plan is inadequate to achieve the primary or secondary standards. Section 110(c)(1), 42 U.S.C. § 1857c-5(c)(1) (Supp. IV 1974). Subsection

(c)(1) also contains a hearing requirement; if a state did not hold a public hearing with respect to the plan or revision being promulgated, the Administrator must provide a hearing within the state. The Administrator is to promulgate his regulations within six months, unless within that time the state has adopted and submitted an implementation plan which is in accord with the requirements of Section 110. *Id.*

It is contended that the instant regulations, which amended the implementation plans of all states,[61] constituted a "revision" under Section 110(a)(2)(H). Under Section 110(c)(1)(C) the Administrator may promulgate new regulations only if a state fails, after 60 days, to submit the required (a)(2)(H) revision. Further, if the regulations are considered "revisions," it is claimed, the Administrator was required by Section 110(c)(1) to hold a hearing in each state before promulgating the regulations.

The original order of the District Court required that the "Administrator • • • prepare and publish proposed regulations, pursuant to 42 U.S.C. § 1857c-5(c), as to any state plan which he finds, on the basis of his review, either permits the significant deterioration of existing air quality in any portion of any state or fails to take the measures necessary to prevent such significant deterioration. Such regulations shall be promulgated within six months of this order." *Sierra Club v. Ruckelshaus*, Civil Action No. 1031-72 (D. D.C. May 30, 1972). That order —which was affirmed by this court and the Supreme Court—clearly did not contemplate that a hearing be held in each state prior to promulgation of regulations, nor did it require that the states be given a prior opportunity to revise their plans. We reaffirm the order in both respects.

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[61] *See* note 9 *supra*.

All states had held public hearings on their proposed implementation plans before the District Court order was entered.[62] After disapproving all state plans insofar as they failed to prevent significant deterioration,[63] the Administrator held five regional hearings in Washington, Atlanta, Dallas, Denver, and San Francisco on proposed regulations,[64] and solicited written comments.[65] We believe that procedure was sufficient in the circumstances presented. Unfortunately, the requirement of prevention of significant deterioration does not fit neatly into the statutory scheme, as it is not expressly included in Section 110 of the Act. The Administrator's disapproval of all plans pursuant to the District Court order, and the subsequent promulgation of regulations, were required by Section 101 of the Act and by the legislative history, but were not within the defined processes of Section 110(c). Implementation of the District Court order required an excercise of discretion by the Administrator, and we find that he acted well within that discretion by concluding that only regional hearings were necessary to supplement the hearings which had already been held in all states.

In making this decision we wish to emphasize, first, that petitioners have not alleged with any specificity how they were harmed by the lack of individual state hearings. We are presented only with a generalized statutory claim,[66] which apparently never was raised before the

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[62] In its initial approval and disapproval of state plans, published May 31, 1972 (37 Fed. Reg. 10842), EPA noted that all states had held hearings and had submitted implementation plans.

[63] 37 Fed. Reg. 23836 (Nov. 9, 1972).

[64] *See* 39 Fed. Reg. 31000 (Aug. 27, 1974).

[65] *Id.*

[66] *Cf. American Airlines, Inc. v. CAB*, 123 U.S.App.D.C. 310 318-319, 359 F.2d 624, 632-633, *cert. denied*, 385 U.S. 843 (1966):

[Continued]

Agency. Second, it should be remembered that the states arguably have been denied no rights by promulgation of the nondeterioration regulations. They remain free, after public hearing, to develop their own regulatory scheme to supplant that promulgated by EPA, so long as the substitute prevents significant deterioration of air quality.[67] We cannot conclude, then, that the regulations are defective on procedural grounds.

K. By providing for reclassification of federal and Indian lands independent of state action, do the regulations abrogate authority granted to the states by the Clean Air Act?

Federal land managers and Indian governing bodies are authorized to propose redesignation of their lands, after consultation with officials of other affected areas and compliance with procedural and hearing requirements. 40 C.F.R. § 52.21(c)(3) (1975).[68] The industrial petitioners and the petitioning state governments object that this authority violates the delegation to the states of authority over air quality within their bound-

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> [T]here is no basis on the present record for concluding that additional procedures were requisite for fair hearing. We might view the case differently if we were not confronted solely with a broad conceptual demand for an adjudicatory-type proceeding, which is at least consistent with, though we do not say it is attributable to, a desire for protracted delay. Nowhere in the record is there any specific proffer by petitioners as to the subjects they believed required oral hearings, what kind of facts they proposed to adduce, and by what witnesses, etc. * * *

See also United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33 (1952).

[67] *See* pp. 16-17 *supra*.

[68] *See* pp. 13-14 *supra*.

aries in Section 101(a)(3), 42 U.S.C. § 1857(a)(3),[69] and Section 107(a), 42 U.S.C. § 1857c-2(a),[70] that it contradicts the submission of federal facilities to state regulation in Section 118, 42 U.S.C. § 1857f,[71] and that the authority to redesignate gives these lands tremendous practical power over neighboring areas which might be hindered in their development because of designation of federal or Indian lands as Class I areas.[72]

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[69] 42 U.S.C. § 1857(a)(3) (1970):

(a) The Congress finds—

• • • •

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments[.]

[70] 42 U.S.C. § 1857c-2(a) (1970):

Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

[71] 42 U.S.C. § 1857f (1970):

Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements. The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the paramount interest of the United States to do so • • •. • • •

[72] *See* 39 Fed. Reg. 42512 (Dec. 5, 1974):

Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air

EPA has responded that federal land managers and Indian governing bodies have an important legal interest in protecting the air quality of their lands, that redesignation may not be proposed without consultation with officials of the affected states,[73] and that the Administrator may disapprove redesignation if arbitrary and capricious disregard of the interests of other affected areas is demonstrated.[74] With regard to submission of federal facilities to state regulation, EPA notes that federal lands may be redesignated only to a more restrictive classification than that applicable to the entire state,[75] and thus cannot contribute to unwanted deterioration of air quality.

We pretermit this question, as we find that the issue is not yet ripe for review.[76] No federal or Indian land

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quality increment either in the area where the source is to be located or in any neighboring area in the State. Therefore, wherever a Class I area adjoins a Class II or III area, the potential growth restrictions, especially for power plant development, extends [*sic*] well beyond the Class I boundaries into the adjacent area. A similar situation exists, to a greater or lesser degree, wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.

[73] 40 C.F.R. § 52.21(c)(3)(iv), (v) (1975).

[74] 40 C.F.R. § 52.21(c)(3)(vi)(*b*), (*c*) (1975).

[75] 40 C.F.R. § 52.21(c)(3)(iv) (1975).

[76] *See Toilet Goods Ass'n Inc. v. Gardner*, 387 U.S. 158 (1967), in which cosmetic manufacturers had brought a pre-

has yet been redesignated, and to that extent we cannot be certain how a conflict may evolve. If the Administrator were to approve, as replacements for these regulations, individual state plans which did not include the powers granted to federal land managers and Indian governing bodies, the problems foreseen by petitioners might never arise.

We note that reservation of power to federal land managers and Indians governing bodies should have no

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enforcement action to challenge the authority of the Commissioner of Food and Drugs to issue regulations under the Color Additive Amendments to the Federal Food, Drug, and Cosmetic Act. The regulation at issue authorized the Commissioner to suspend certification service to any person who denied the FDA free access to manufacturing information. Although the issue was purely legal, the Court found that, as framed, it was not appropriate for judicial resolution:

> The regulation serves notice only that the Commissioner *may* under certain circumstances order inspection of certain facilities and data, and that further certification of additives *may* be refused to those who decline to permit a duly authorized inspection until they have complied in that regard. At this juncture we have no idea whether or when such an inspection will be ordered and what reasons the Commissioner will give to justify his order. The statutory authority asserted for the regulation is the power to promulgate regulations "for the efficient enforcement" of the Act, § 701(a). Whether the regulation is justified thus depends not only, as petitioners appear to suggest, on whether Congress refused to include a specific section of the Act authorizing such inspections, although this factor is sure to be a highly relevant one, but also on whether the statutory scheme as a whole justified promulgation of the regulation. * * * This will depend not merely on an inquiry into statutory purpose, but concurrently on an understanding of what types of enforcement problems are encountered by the FDA, the need for various sorts of supervision in order to effectuate the goals of the Act, and the safeguards devised to protect legitimate trade secrets * * *. We believe that judicial appraisal of these factors is likely to stand on

effect on present conduct; there appears to be no reason why economic development of any area should be hindered by the possibility that a nearby area may be redesignated in the future to a more restrictive classification. We therefore do not foresee any irreparable injury which may arise from deferral of this question until it arises in a more concrete context.

L. Are the regulations constitutional?

We find the arguments challenging the constitutionality of the nondeterioration regulations to be insubstantial. Regulation of air pollution clearly is within the power of the federal government under the commerce clause,[77] and we can see no basis on which to distinguish deterioration of air cleaner than national standards from pollution in other contexts.[78] Nor do we agree that the regulations bear no rational relationship to protection of public health and welfare and therefore violate the due process clause of the Fifth Amendment. There is a rational relationship between air quality deterioration and the public health and welfare,[79] and there is a proper legislative purpose[80] in prevention of significant

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much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here.

387 U.S. at 163-164 (emphasis in original).

[77] *See District of Columbia v. Train*, 172 U.S.App.D.C. 311, 328, 521 F.2d 971, 988 (1975); *Pennsylvania v. EPA*, 500 F.2d 246, 259 (3d Cir. 1974); *South Terminal Corp. v. EPA*, 504 F.2d 646, 677 (1st Cir. 1974).

[78] Indeed, the vigorous objections that have been mounted against redesignation of federal lands or Indian lands are based on recognition that a pollution source can have air quality effects over a large area.

[79] *See* note 58 *supra*.

[80] *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-259 (1964), in which the Court held the Civil

deterioration of air quality. Neither can the regulations be construed as an unconstitutional "taking" under the Fifth Amendment, any more than existing emission control regulations represent such a "taking." [81] The use of private land certainly is limited, but the limitation is not so extreme as to represent an appropriation of the land.

The Tenth Amendment is not implicated either by infringement on the reserved powers of the states, *cf. National League of Cities v. Usery*, —— U.S. ——, 44 U.S. L. WEEK 4974 (June 24, 1976), or by any requirement of affirmative action, as in *District of Columbia v. Train*, 172 U.S.App.D.C. 311, 521 F.2d 971 (1975). The states retain broad discretion under the regulations to control the use of their land and the scope of their economic development, and are required to take no affirmative action. Preconstruction review under the regulations is conducted by the Administrator unless a state requests that responsibility be delegated to it. 40 C.F.R. § 52.21(d), (f) (1975).

Rights Act of 1964 to be a valid exercise of congressional power under the commerce clause, and found the Act not barred by the Fifth Amendment:

> Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appropriate. * * *

See also Nebbia v. New York, 291 U.S. 502, 537 (1934) (Fourteenth Amendment).

[81] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 678 (1st Cir. 1974), in which the court upheld a transportation control plan which mandated a 40% reduction in available off-street parking spaces:

> [T]he Government has not taken title to the spaces, and the decision about alternative uses of the space has been left to the owner. The takings clause is ordinarily not offended by regulation of uses, even though the regulation may severely or even drastically affect the value of the land or real property. If the highest-valued use of the property is forbidden by regulations of general applicability, no taking has occurred so long as other lower-valued, reasonable uses are left to the property's owner. * * *

Last, we find no merit to the argument that the congressional delegation of authority to EPA is unconstitutionally vague. There is substantial basis for the instant regulations in both the Clean Air Act and its legislative history, and we find the regulations to be a reasonable means of implementing the congressional intent.[82] *See South Terminal Corp. v. EPA*, 504 F.2d 646, 676-677 (1st Cir. 1974).

VI. CONCLUSION

We find no ground on which to disturb the regulations under review, and we therefore affirm the EPA "Prevention of Significant Air Quality Deterioration"

[82] In *Lichter v. United States*, 334 U.S. 742, 785 (1947), the Court upheld a congressional grant of authority to the Secretary of War, the Secretary of the Navy, and the Chairman of the Maritime Commission to renegotiate contracts and to recover "excessive profits." The Court applied the following reasoning to the claim that the term "excessive profits" was unconstitutionally vague:

> It is not necessary that Congress supply administrative officials with a specific formula for their guidance in a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program. "If Congress shall lay down by legislative act an intelligible principle . . . such legislative action is not a forbidden delegation of legislative power." *Hampton Co.* v. *United States*, 276 U.S. 394, 409. Standards prescribed by Congress are to be read in the light of the conditions to which they are

regulations.[82] Our review of *Sierra Club v. Ruckelshaus* and subsequent events has revealed no substantial reason for rejection of that decision, and we hold that the non-deterioration regulations promulgated pursuant to that decision are both rational and in accordance with law.

Affirmed.

Circuit Judge WILKEY concurs in the result only.

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to be applied. "They derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.* v. *S.E.C.*, 329 U.S. 90, 104. * * *

[83] As noted above, *see* pp. 49-51, we do not decide the question whether reclassification of federal and Indian lands independent of state action may be unlawful.

APPENDIX B

RELEVANT PORTIONS OF THE CLEAN AIR ACT

§§ 101, 103(f), 108, 109, 110, 111, 116, 302, 304, 307(b)

Findings and Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, state, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Research, Investigation, Training, and Other Activities

Sec. 103.

(f)(1) In carrying out research pursuant to this Act, the Ad-

ministrator shall give special emphasis to research on the short- and long-term effects of air pollutants on public health and welfare. In the furtherance of such research, he shall conduct an accelerated research program

(A) to improve knowledge of the contribution of air pollutants to the occurrence of adverse effects of health, including, but not limited to, behavioral, physiological, toxicological, and biochemical effects; and

(B) to improve knowledge of the short- and long-term effects of air pollutants on welfare.

(2) In carrying out the provisions of this subsection the Administrator may

(A) conduct epidemiological studies of the effects of air pollutants on mortality and morbidity;

(B) conduct clinical and laboratory studies on the immunologic, biochemical, physiological, and toxicological effects including carcinogenic, teratogenic, and mutagenic effects of air pollutants;

(C) utilize, on a reimbursable basis, the facilities of existing Federal scientific laboratories and research centers;

(D) utilize the authority contained in paragraphs (1) through (4) of subsection (b); and

(E) consult with other appropriate Federal agencies to assure that research or studies conducted pursuant to this subsection will be coordinated with research and studies of such other Federal agencies.

(3) In entering into contracts under this subsection, the Administrator is authorized to contract for a term not to exceed 10 years in duration. For the purposes of this paragraph, there are authorized to be appropriated $15,000,000. Such amounts as are appropriated shall remain available until expended and shall be in addition to any other appropriations under this Act.

Air Quality Criteria and Control Techniques

Sec. 108. (a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b) (1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of pre-

vention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a)(1), which shall be comprised of technically qualified individuals, representatives of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

National Ambient Air Quality Standards

Sec. 109. (a)(1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards

for any such pollutant. The procedure provided for in paragraph (1)(B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under Section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental co-operation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment

by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standards or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Ad-

ministrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources) and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise

an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (II).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not

condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to

which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and

(D) of paragraph (1)) shall be sustained if based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceding under this subsection.

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term 'existing source' means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories

of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110

under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b)(1)(A) but (ii) to which a standard of performance under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Retention of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

[PL 93-319, June 24, 1974]

Definitions

Sec. 302. When used in this Act—

(a) The term 'Administrator' means the Administrator of the Environmental Protection Agency.

(b) The term 'air pollution control agency' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term 'interstate air pollution control agency' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term 'State' means a State, the District of Columbia, the Commonwealth of Puero Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term 'person' includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term 'municipality' means a city, town, borough, county, parish, district or other public body created by or pursuant to State law.

(g) The term 'air pollutant' means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.

Citizen Suits

Sec. 304. (a) Except as provided in subsection (b), any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this Act or (B) an order issued by the Administrator of a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this Act which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy of the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

(b) No action may be commenced—

(1) under subsection (a) (1)

(A) prior to 60 days after the plaintiff has given notice of the violation (i) to the Administrator, (ii) to the State in which the violation occurs, and (iii) to any alleged violation of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any person may intervene as a matter of right.

(2) under subsection (a) (2) prior to 60 days after the plaintiff has given notice of such action to the Administrator, except that

such action may be brought immediately after such notification in the case of an action under this section respecting a violation of section 112(c)(1)(B) or an order issued by the Administrator pursuant to section 113(a). Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a stationary source of an emission standard or limitatios or an order re pecting such standard or limitation may be brought only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) For purposes of this section, the term 'emission standard or limitation under this Act' means—

(1) a schedule or timetable of compliance, emission limitation, standard of performance or emission standard, or

(2) a control or prohibition respecting a motor vehicle fuel or fuel additive, which is in effect under this Act (including a requirement applicable by reason of section 118) or under an applicable implementation plan.

General Provision Relating to Administrative Proceedings and Judicial Review

Sec. 307

(b) (1) A petition for review of action of the Administrator in

promulgating any national primary or secondary ambient air quality standard, any emission standard under section 112, any standard of performance under section 111; any standard under section 202 (other than a standard required to be prescribed under section 202(b)(1)), any determination under section 202(b)(5), any control or prohibition under section 211, or any standard under section 231 may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 110 or section 111(d), or his action under section 119(c)(2)(A), (B), or (C) or under regulations thereunder, may be filed only in the United States Court of Appeals for the appropriate circuit. Any such petition shall be filed within 30 days from the date of such promulgation, approval, or action or after such date if such petition is based solely on grounds arising after such 30th day.

[PL 93-319, June 24, 1974]

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement.

(c) In any judicial proceeding in which review is sought of a determination under this Act required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the administrator, in such manner and upon such terms and conditions as to the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence.

APPENDIX C

EPA REGULATIONS ENTITLED "PREVENTION OF SIGNIFICANT AIR QUALITY DETERIORATION"

40 C.F.R. §§ 52.01(d) and (f), 52.21

Subpart A, Part 52, Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 *Definitions.*

* * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which, is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

2. Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

§ 52.21 *Significant deterioration of air quality.*

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

(b) *Definitions.* For the purposes of this section:

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and means the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval (pursuant to approved new source review procedures in the plan) for construction or modification but not yet operating prior

to January 1, 1975. These concentrations shall be established for all time periods covered by the increments set forth under paragraph (c)(2)(i) of this section and may be measured or estimated. In the case of the maximum three-hour and twenty-four-hour concentrations, only the second highest concentrations should be considered.

(2) The phrase "Administrator" means the Administrator of the Environmental Protection Agency or his designated representative.

(3) The phrase "Federal Land Manager" means the head, or his designated representative, of any Department or Agency of the Federal Government which administers federally-owned land, including public domain lands.

(4) The phrase "Indian Reservation" means any federally-recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(5) The phrase "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

(6) "Construction" means fabrication, erection, or installation of an affected facility.

(7) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(c) *Area designation and deterioration increment.* (1) This paragraph applies to all States listed in Subpart B through DDD of this part, all lands owned by the Federal Government, and Indian Reservations, except those counties or other functionally equivalent areas that pervasively exceed any national ambient air quality standards for sulfur oxides or total suspended particulates and then only with respect to such pollutants. States shall notify the Administrator by June 1, 1975, of those areas which are above the national air quality standards and therefore are exempt from the requirements of this paragraph.

(2) (i) For purpose of this paragraph, areas designated as Class I or Class II shall be limited to the following increases in pollutant concentrations over the baseline air quality concentration:

Area designations

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr. maximum	10	30
Sulfur dioxide:		
Annual arithmetic mean	2	15
24-hr. maximum	5	100
3-hr. maximum	25	700

(ii) For purposes of this paragraph, areas designated as Class III shall be limited to concentrations of particulate matter and sulfur dioxide no greater than the national ambient air quality standards.

(3) (i) All areas are designated Class II as of the effective date of this paragraph. Redesignation may be proposed by the respective States, Federal Land Managers, or Indian Governing Bodies, as provided below, subject to approval by the Administrator.

(ii) The State may submit to the Administrator a proposal to redesignate areas of the State Class I, Class II, or Class III, provided that:

(*a*) At least one public hearing is held in or near the area affected and this public hearing is held in accordance with procedures established in § 51.4 of this chapter, and

(*b*) Other States which may be affected by the proposed redesignation are notified at least 30 days prior to the public hearing, and

(*c*) A discussion of the reasons for the proposed redesignation is available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contains appropriate notification of the availability of such discussion, and

(*d*) The proposed redesignation is based on the record of the State's hearing, which must reflect the basis for the proposed redesignation, including consideration of (1) growth anticipated in the area, (2) the social, environmental, and economic effects of such redesignation upon the area being proposed for redesignation and upon other areas and States, and (3) any impacts of such proposed redesignation upon regional or national interests.

(iii) Except as provided in subdivision (iv) of this subparagraph, a State in which lands owned by the Federal Government are located may submit to the Administrator a proposal to redesignate such lands Class I, Class II, or Class III in accordance with subdivision (ii) of the subparagraph provided that:

(*a*) The redesignation is consistent with adjacent State and privately owned land, and

(*b*) Such redesignation is proposed after consultation with the Federal Land Manager.

(iv) Notwithstanding subdivision (iii) of this subparagraph, the Federal Land Manager may submit to the Administrator a proposal to redesignate any Federal lands to a more restrictive designation than would otherwise be applicable provided that:

(*a*) The Federal Land Manager follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Federal Land is located or which border the Federal land.

(v) Nothing in this section is intended to convey authority to the States over Indian Reservations where States have not assumed such authority under other laws nor is it intended to deny jurisdiction which States have assumed under other laws. Where a State has not assumed jurisdiction over an Indian Reservation the appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III, provided that:

(*a*) The Indian Governing Body follows procedures equivalent to those required of States under paragraph (c)(3)(ii) and,

(*b*) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is located or which border the Indian Reservation and, for those lands held in trust, with the approval of the Secretary of the Interior.

(vi) The Administrator shall approve, within 90 days, any redesignation proposed pursuant to this subparagraph as follows:

(*a*) Any redesignation proposed pursuant to subdivisions (ii) and (iii) of this subparagraph shall be approved unless the Administrator determines (*1*) that the requirements of subdivisions (ii) and (iii) of this subparagraph have not been complied with, (*2*) that the state has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph, (*3*) that the State has not requested delegation of responsibility for carrying out the new source review requirements of paragraphs (d) and (e) of this section.

(*b*) Any redesignation proposed pursuant to subdivision (iv) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (iv) of this subparagraph have not been complied with, or (2) that the Federal Land Manager has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*c*) Any redesignation submitted pursuant to subdivision (v) of this subparagraph shall be approved unless he determines (*1*) that the requirements of subdivision (v) of this subparagraph have not been complied with, or (2) that the Indian Governing Body has arbitrarily and capriciously disregarded relevant considerations set forth in subparagraph (3)(ii)(*d*) of this paragraph.

(*d*) Any redesignation proposed pursuant to this paragraph shall be approved only after the Administrator has solicited written comments from affected Federal agencies and Indian Governing Bodies and from the public on the proposal.

(*e*) Any proposed redesignation protested to the proposing State, Indian Governing Body, or Federal Land Manager and to the Administrator by another State or Indian Governing Body because of the effects upon such protesting State or Indian Reservation shall be approved by the Administrator only if he determines that in his judgment the redesignation appropriately balances con-

siderations of growth anticipated in the area proposed to be redesignated; the social, environmental and economic effects of such redesignation upon the area being redesignated and upon other areas and States; and any impacts upon regional or national interests.

(vii) If the Administrator disapproves any proposed area designation under this subparagraph, the State, Federal Land Manager or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator or reconsidering any area designation determined by the Administrator to be arbitrary and capricious.

(d) *Review of new sources.* (1) This paragraph applies to any new or modified stationary source of a type identified below which will be located in any State listed in Subpart B through DDD of this part, which source has not commenced construction or expansion prior to June 1, 1975. A source which is modified, but does not increase the amount of a pollutant other than sulfur oxides or particulate matter, or is modified to utilize an alternative fuel, or higher sulfur content fuel shall not be subject to this paragraph.

(i) Fossil-Fuel Steam Electric Plants of more than 1000 million B.T.U. per hour heat input.
(ii) Coal Cleaning Plants.
(iii) Kraft Pulp Mills.
(iv) Portland Cement Plants.
(v) Primary Zinc Smelters.
(vi) Iron and Steel Mills.
(vii) Primary Aluminum Ore Reduction Plants.
(viii) Primary Copper Smelters.
(ix) Municipal Incinerators capable of charging more than 250 tons of refuse per 24 hour day.
(x) Sulfuric Acid Plants.
(xi) Petroleum Refineries.
(xii) Lime Plants.
(xiii) Phosphate Rock Processing Plants.
(xiv) By-Product Coke Oven Batteries.
(xv) Sulfur Recovery Plants.
(xvi) Carbon Black Plants (furnace process).

(xvii) Primary Lead Smelters.
(xviii) Fund Conversion Plants.

(2) No owner or operator shall commence construction or modification of a source subject to this paragraph unless the Administrator determines that, on the basis of information submitted pursuant to subparagraph (3) of this paragraph:

(i) The effect on air quality concentration of the source or modified source, in conjunction with the effects of growth and reduction in emissions after January 1, 1975, of other sources in the area affected by the proposed source, will not violate the air quality increments applicable in the area where the source will be located nor the air quality increments applicable in any other areas. The analysis of emissions growth and reduction after January 1, 1975, or other sources in the areas affected by the proposed source shall include all new and modified sources granted approval to construct pursuant to this paragraph; reduction in emissions from existing sources which contributed to the baseline air quality; and general commercial, residential, industrial, and other sources of emissions growth not included in the definition of baseline air quality which has occurred since January 1, 1975.

(ii) The new or modified source will meet an emission limit, to be specified by the Administrator as a condition to approval which represents that level of emission reduction which would be achieved by the application of best available control technology, as defined in § 52.01(f), for particulate matter and sulfur dioxide. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

(iii) With respect to modified sources, the requirements of subparagraph (2)(ii) of this paragraph shall be applicable only to the facility or facilities from which emissions are increased.

(3) In making the determinations required by subparagraph (2) of this paragraph, the Administrator shall, as a minimum, require the owner or operator of the source subject to this paragraph to submit: site information; plans, description, specifications, and drawings showing the design of the source; information necessary to determine the impact that the construction or modification will have on sulfur dioxide and particulate matter air quality levels; and any other information necessary to determine that best available control technology will be applied. Upon request of the Administrator, the owner or operator of the source shall also provide information on the nature and extent of general commercial, residential, industrial, and other growth which has occurred in the area affected by the source's emissions (such area to be specified by the Administrator) since the effective date of this paragraph.

(4) (i) Where a new or modified source is located on Federal lands, such source shall be subject to the procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be in addition to applicable procedures conducted by the Federal Land Manager for administration and protection of the affected Federal Lands. Where feasible, the Administrator will coordinate his review and hearings with the Federal Land Manager to avoid duplicate administrative procedures.

(ii) New or modified sources which are located on Indian Reservations shall be subject to procedures set forth in paragraphs (d) and (e) of this section. Such procedures shall be administered by the Administrator in cooperation with the Secretary of the Interior with respect to lands over which the State has not assumed jurisdiction under other laws.

(iii) Whenever any new or modified source is subject to action by a Federal agency which might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this paragraph shall be coordinated with the broad environmental reviews under that Act to the maximum feasible and reasonable.

(5) Where an owner or operator has applied for permission to construct or modify pursuant to this paragraph and the proposed

source would be located in an area which has been proposed for redesignation to a more stringent class (or the State, Indian Governing Body, or Federal Land Manager has announced such consideration), approval shall not be granted until the Administrator has acted on the proposed redesignation.

(e) *Procedures for public participation.* (1) (i) Within 20 days after receipt of an application to construct, or any addition to such application, the Administrator shall advise the owner or operator of any deficiency in the information submitted in support of the application. In the event of such a deficiency, the date of receipt of the application for the purpose of paragraph (e) (1) (ii) of this section shall be the date on which all required information is received by the Administrator.

(ii) Within 30 days after receipt of a complete application, the Administrator shall:

(*a*) Make a preliminary determination whether the source should be approved, approved with conditions, or disapproved.

(*b*) Make available in at least one location in each region in which the proposed source would be constructed, a copy of all materials submitted by the owner or operator, a copy of the Administrator's preliminary determination and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(*c*) Notify the public, by prominent advertisement in newspaper of general circulation in each region in which the proposed source would be constructed, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the source.

(iii) A copy of the notice required pursuant to this subparagraph shall be sent to the applicant and to officials and agencies having cognizance over the locations where the source will be situated as follows: State and local air pollution control agencies, the chief executive of the city and county; any comprehensive regional land use planning agency; and any State, Federal Land

Manager, or Indian Governing Body whose lands will be significantly affected by the source's emissions.

(iv) Public comments submitted in writing within 30 days after the date such information is made available shall be considered by the Administrator in making his final decision on the application. No later than 10 days after the close of the public comment period, the applicant may submit a written response to any comments submitted by the public. The Administrator shall consider the applicant's response in making his final decision. All comments shall be made available for public inspection in at least one location in the region in which the source would be located.

(v) The Administrator shall take final action on an application within 30 days after the close of the public comment period. The Administrator shall notify the applicant in writing of his approval, conditional approval, or denial of the application, and shall set forth his reasons for conditional approval or denial. Such notification shall be made available for public inspection in at least one location in the region in which the source would be located.

(vi) The Administrator may extend each of the time periods specified in paragraph (e)(1) (ii), (iv), or (v) of this section or such other period as agreed to by the applicant and the Administrator.

(2) Any owner or operator who constructs, modifies, or operates a stationary source not in accordance with the application, as approved and conditioned by the Administrator, or any owner or operator of a stationary source subject to this paragraph who commences construction or modification after June 1, 1975, without applying for and receiving approval hereunder, shall be subject to enforcement action under section 113 of the Act.

(3) Approval to construct or modify shall become invalid if construction or expansion is not commenced within 18 months after receipt of such approval or if construction is discontinued for a period of 18 months, or more. The Administrator may extend such time period upon a satisfactory showing that an extension is justified.

(4) Approval to construct or modify shall not relieve any owner or operator of the responsibility to comply with the control strategy and all local, State, and Federal regulations which are part of the applicable State Implementation Plan.

(f) *Delegation of authority.* (1) The Administrator shall have the authority to delegate responsibility for implementing the procedures for conducting source review pursuant to paragraphs (d) and (e), in accordance with subparagraphs (2), (3), and (4) of this paragraph.

(2) Where the Administrator delegates the responsibility for implementing the procedures for conducting source review pursuant to this section to any Agency, other than a regional office of the Environmental Protection Agency, the following provisions shall apply:

(i) Where the agency designated is not an air pollution control agency, such agency shall consult with the appropritte State or local air pollution control agency prior to making any determination required by paragraph (d) of this section. Similarly, where the agency designated does not have continuing responsibilities for land use planning, such Agency shall consult with the appropriate State and local land use planning agency prior to making any determination required by paragraph (d) of this section.

(ii) A copy of the notice pursuant to paragraph (e)(1)(ii)(*c*) of this section shall be sent to the Administrator through the appropriate regional office.

(3) In accordance with Executive Order 11752, the Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be delegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are owned or operated by the Federal government or for new or modified sources located on Federal lands; except that, with respect to the latter category, where new or modified sources are constructed or operated on Federal lands pursuant to leasing or other Federal agreements, the Federal land Manager may at his discretion, to the extent permissible under applicable statutes and regulations, require the lessee or permittee to

be subject to a designated State or local agency's procedures developed pursuant to paragraphs (d) and (e) of this section.

(4) The Administrator's authority for implementing the procedures for conducting source review pursuant to this section shall not be redelegated, other than to a regional office of the Environmental Protection Agency, for new or modified sources which are located on Indian reservations except where the State has assumed jurisdiction over such land under other laws, in which case the Administrator may delegate his authority to the States in accordance with subparagraphs (2), (3), and (4) of this paragraph.

Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-603

ALABAMA POWER COMPANY,
GEORGIA POWER COMPANY,
GULF POWER COMPANY and
MISSISSIPPI POWER COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, as Administrator,
Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-603

ALABAMA POWER COMPANY,
GEORGIA POWER COMPANY,
GULF POWER COMPANY and
MISSISSIPPI POWER COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY and
RUSSELL E. TRAIN, as Administrator,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is officially reported at 540 F. 2d 1114 (D. C. Cir. 1976).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 2, 1976. A Petition for Writ of Certiorari was filed within 90

days of that date and this Court granted the Petition on April 4, 1977. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether regulations promulgated by the Environmental Protection Agency to prevent the significant deterioration of air quality are authorized by the Clean Air Act?

2. Whether the Clean Air Act permits the Environmental Protection Agency to adopt regulations which grant to federal land managers and Indian governing bodies power to reclassify federal and Indian lands within their jurisdiction?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Clean Air Act, 42 U.S.C. §§ 1857, et seq. (the Act) are set forth in the Addendum to this brief. The regulations of the United States Environmental Protection Agency (EPA) entitled "Prevention of Significant Air Quality Deterioration", 40 C.F.R. §§ 52.01 (d) and (f), 52.21, appear in the Appendix, A. 226a-291a.

STATEMENT OF THE CASE

This case involves the review of the authority for the promulgation by EPA of regulations entitled "Prevention of Significant Air Quality Deterioration", pursuant to the Clean Air Act, as amended, 42 U.S.C. §§ 1857, et seq. (the Act), which disapprove of state implementation plans adopted under the Act to the extent that such plans lack regulations for prevention of significant deterioration of air quality and promulgate revisions to such plans for portions of those states where air quality is better than the national primary and secondary air standards.

A. History of the Regulations

Pursuant to the Act, EPA established national primary and secondary ambient air quality standards for each air pollutant deemed to have an adverse effect on public health and welfare and for which air quality criteria were issued.[1] The primary air quality standards established pursuant to Section 109 of the Act are those standards which, allowing an adequate margin of safety, are requisite to protect the public health, and secondary standards are those which are requisite to protect the public welfare from any known or anticipated adverse effects of the specified air pollutants. Following the promulgation of these standards in 1971[2] and pursuant to Section 110 of the Act, each state promulgated a plan to implement, maintain and enforce the national standards and submitted such plan to EPA for approval. EPA initially approved all state implementation plans which complied with the requirements set forth in Section 110 (a) (2) of the Act.[3]

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[1]Section 108(a)(2) of the Act, 42 U.S.C. § 1857c-3(a)(2), provides that the Administrator must issue air quality criteria for each air pollutant which "shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air in varying quantities." Section 109(a), 42 U.S.C. § 1857c-4(a), provides that the Administrator must promulgate national ambient air quality standards for each air pollutant for which air quality criteria are issued.

[2]40 C.F.R. Part 50, 36 Fed. Reg. 22384 (November 25, 1971).

[3]40 C.F.R. Part 52, 37 Fed. Reg. 2581 (February 3, 1972); Section 110(a)(2)(A)-(H), 42 U.S.C. § 1857c-5(a)(2)(A)-(H), sets forth the eight requirements of state implementation plans which are (1) provisions for the attainment of primary and secondary standards within certain time periods, (2) emission limitations, schedules and timetables for compliance with such limitations and such other measures to insure attainment and maintenance of such standards, (3) provisions for the establishment and operation of devices and procedures for monitoring and analyzing ambient air quality data, (4) procedures for reviewing the location of new sources to which the standards apply, (5) adequate provisions for intergovernmental cooperation, (6) assurance that the state will have adequate personnel, funding and authority to monitor and enforce compliance, and (7) pro-

Thereafter, the Sierra Club and others brought an action in the United States District Court for the District of Columbia seeking to require EPA to include a provision for the prevention of significant air quality deterioration in all state implementation plans. U. S. District Court Judge John H. Pratt, in refusing to accept EPA's interpretation of the Act, ordered the Administrator of EPA to disapprove state plans which failed to provide measures to prevent significant deterioration of air quality and to promulgate regulations providing for such prevention in each state plan. *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972). This initial decision on the issue of significant deterioration was made in the procedural context of a preliminary injunction and thus was not a full and complete adjudication on the merits of the case. The decision was thereafter affirmed per curiam without opinion by the U. S. Court of Appeals for the District of Columbia Circuit. *Sierra Club v. Ruckelshaus*, C.A. No. 72-1528 (D.C. Cir. 1972) (per curiam) and affirmed by this Court in an equally divided decision without opinion. *Fri. v. Sierra Club*, 412 U.S. 541 (1973).[4]

In response to the Court's order, on July 16, 1973, EPA issued proposed regulations disapproving all state plans and providing four alternative provisions for prevention of significant air quality deterioration.[5] Following public com-

visions for modification of the plan to account for revisions in national ambient air quality standards or improved methods for achieving compliance.

[4]Under the precedents of this Court, an affirmance by an equally divided court is not authority on the legal principles involved for the determination of other cases. See, e.g. *Neil v. Biggers*, 409 U.S. 188, 191-193 (1972); *United States v. Pink*, 315 U.S. 203 (1942).

[5]38 Fed. Reg. 18986 (July 16, 1973); (A. 91a); In promulgating these regulations, EPA emphasized the impact of this scheme of air quality regulations:

"A national policy of preventing significant deterioration, however defined and implemented, will have a substantial impact on the nature,

ments and hearings, the Administrator on August 27, 1974, again proposed regulations providing for a revised plan for prevention of significant air quality deterioration.[6] The final regulations which are the subject of this action were issued on December 5, 1974.[7] Effective January 6, 1975, these regulations apply to "any new or modified stationary source" as defined under the regulations and which commences construction or expansion after June 1, 1975.[8]

The EPA regulations are designed to prevent significant deterioration in the quality of air by limiting increases in the concentrations of particulate matter and sulfur dioxide by applicable sources in areas where air quality in 1974 is better than the national ambient air quality standards.[9] Three classes of clean air areas are established. Class I and Class II areas are limited to maximum allowable incremental increases in sulfur dioxide and total suspended particu-

extent, and location of future industrial, commercial, and residential development throughout the United States. It could affect the utilization of the Nation's mineral resources, the availability of employment and housing in many areas, and the costs of producing and transporting electricity and manufactured goods." Id.

[6]39 Fed. Reg. 31000 (August 27, 1974); (A. 160a).

[7]39 Fed. Reg. 42510 (December 5, 1975); (A. 206a). Clarifying amendments to these regulations were adopted on January 6, 1975 (40 Fed. Reg. 2802) (A. 242a), June 12, 1975 (40 Fed. Reg. 25004) (A. 246a); and September 10, 1975 (40 Fed. Reg. 42011) (A. 284a).

[8]40 C.F.R. § 52.21(d)(1) (1974) (A. 234a); The eighteen sources covered by these regulations include the following: (i) fossil-fuel steam electric plants of more than 1000 million B.T.U. per hour heat input; (ii) coal cleaning plants; (iii) Kraft pulp mills; (iv) Portland cement plants; (v) primary zinc smelters; (vi) iron and steel mills; (vii) primary aluminum ore reduction plants; (viii) primary copper smelters; (ix) municipal incinerators capable of charging more than 250 tons of refuse per 24-hour day; (x) sulfuric acid plants; (xi) petroleum refineries; (xii) lime plants; (xiii) phosphate rock processing plants; (xiv) by-product coke oven batteries; (xv) sulfur recovery plants; (xvi) carbon black plants (furnace process); (xvii) primary lead smelters; (xviii) fuel conversion plants.

[9]The majority of the lands of the United States have air which is cleaner than is required by the national ambient air standards. S. Rep. No. 94-717, 94th Cong., 2d Sess., 21 (1976).

late matter over baseline air quality.[10] Class III areas are limited by the national ambient air standards.[11] While all areas of the states are originally designated Class II, the states are permitted to propose redesignation of areas as Class I, II or III.[12] However, the Federal land managers and Indian governing bodies can propose redesignation of any of their lands to a more restrictive classification.[13] Further, the regulations can prohibit the construction of a new source which would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the state. "For example, a power plant which just meets the Class II increment for SO_2 could, under certain conditions, violate the Class I increment for SO_2 60 more miles away."[14] Thus the restrictions under these regulations go beyond the specific areas classified.

B. The Decision Below

Following the issuance of these EPA regulations, some 14 petitions seeking review were filed in various United States Courts of Appeal.[15] Those petitions which were not filed

[10]Id. at § 52.21(c)(2)(i) (A. 230a). The air quality increments for Class I and II areas are as follows:

Pollutant	Class I (g/m)	Class II (g/m)
Particulate matter:		
Annual geometric mean	5	10
24-hr maximum	10	30
Sulfur dioxide:		
Annual arithmetric mean	2	15
24-hr maximum	5	100
3-hr maximum	25	700

[11]Id. at 52.21(c)(2)(ii) (A. 230a).

[12]Id. at 52.21(c)(3)(ii) (A. 230a).

[13]Id. at 52.21(c)(3)(iv) and (v) (A. 231a-232a).

[14]39 Fed. Reg. 42510, 42512 (December 5, 1974) (A. 218a-219a).

[15]Petitions were filed separately by American Petroleum Institute, Montana Power Company, Sierra Club, The Dayton Power and Light Company, Public Service Company of Colorado, Utah Power and Light Company, State of New Mexico, Pacific Coal Gasification Company, Utah

in the District of Columbia Circuit were transferred to that Court, and the Court consolidated all of the cases. Among the petitions filed was a petition of the petitioners herein seeking to overturn these regulations.[16] The U. S. Court of Appeals for the District of Columbia Circuit, however, upheld the regulations, concluding that, in the legislative history of the Act, an understanding exists that the Act embodies a policy of non-deterioration of air cleaner than the national ambient air standards.[17] Thus the Court below reaffirmed its prior ruling without opinion in *Sierra Club v. Ruckelshaus* and concluded that no support exists for the proposition that Section 110 (a) (2) of the Act and its specific requirements for state plans were intended to limit the policy of non-deterioration in any way.[18]

The Court below relied upon the Air Quality Act of 1967 and its legislative history which it found to express a policy of non-deterioration and to be accepted and followed in the Clean Air Act of 1970.[19] This policy is said to be based upon the "protect and enhance" language contained in Section 101 (b) (1) of the Act. In so holding, the Court below found that the statutory basis for these regulations is the preamble of the Act which sets forth in general terms the

International, Inc., Indiana-Kentucky Electric Corporation, Buckeye Power Inc., Salt River Project Agricultural Improvement and Power District, as well as the petitioners herein. (A. 11a-33a).

[16]The petitioners herein, Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company, are subsidiary operating companies of The Southern Company and together constitute one of the nation's largest investor-owned electric utility groups. Their combined service area includes most of the states of Alabama and Georgia and areas of northwest Florida and southeast Mississippi. Because these companies are involved in the planning, construction and operation of electric power plants and are vitally interested in the future economic growth within this service area, they are concerned with and directly affected by the establishment and implementation of these regulations.

[17]*Sierra Club v. EPA*, 540 F. 2d 1114, 1127 (D. C. Cir 1976); (A. 55a).

[18]Id. at 1129; (A. 59a).

[19]Id. at 1124-1125; (A. 55a-58a).

statutory purposes of the Act.[20] The Court also concluded that these regulations are supported by the legislative history of the Act, even though it cited only one statement in a Senate Report on this legislation in support of its conclusion.[21] The Court found no support for these regulations in the substantive provisions of the Act. The Court also failed to attempt to reconcile the fact that EPA, when charged with implementing the Act, concluded that the Act did not require the implementation of a policy of non-deterioration.[22]

The Court below also rejected the industry petitioners' argument that this Court's decision in *Train v. Natural Resources Def. Council*, 421 U.S. 60 (1975), is inconsistent with a requirement that all state plans which fail to prevent significant air quality deterioration should be disapproved by EPA. In attempting to distinguish this decision, the Court stated that the *Train* decision concerned air pollution below rather than above national standards and the issue of non-deterioration was not considered.[23] Similarly, the Court below rejected this Court's decision in *Union Electric Company v. EPA*, 427 U.S. 246 (1976). The Court stated that this Court in *Union Electric Company* did not consider whether the "shall approve" language of Section 110 (a) (2) can "subvert the concomittant congressional directive that significant deterioration . . . be prevented."[24] In concluding that these cases are not controlling, the Court below refused to recognize this Court's adherence to the plain meaning of Section 110 (a) (2).

The Court below also refused to consider the industry and state government petitioners' argument that the authorization of Federal land managers and Indian governing bodies to propose redesignation of their lands under these regulations deprives the states of their authority under the Act. The Court concluded that this issue was not yet ripe for review because it could not "be certain how a conflict may evolve."[25] Thus the Court dismissed an issue which focused on a portion of the regulations which could result in a serious confrontation between state and federal authority over the regulation of air pollution within state geographical boundaries.

[20]Id.
[21]Id.
[22]See text accompanying notes 77-80 infra.
[23]Id. at 1128; (A. 64a).
[24]Id. at 1129; (A. 64a).

SUMMARY OF ARGUMENT

The substantive provisions of the Clean Air Act are unambiguous in their failure to authorize the establishment of regulations for prevention of significant air quality deterioration. Such regulations are inconsistent with the statutory scheme for the establishment and maintenance of national primary and secondary ambient air quality standards, which by definition, are designed to protect against all adverse effects of air pollutants. These regulations are also inconsistent with Sections 111 and 116 of the Act which are designed to insure protection of clean air areas to the extent desirable and necessary. Moreover, these regulations are inconsistent with the express provisions of Section 110 (a) (2) of the Act which do not require that EPA disapprove State implementation plans which fail to provide for prevention of significant air quality deterioration. This inconsistency has been confirmed by this Court in its recent decisions in *Train v. NRDC*, 421 U.S. 60 (1975), *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), and *Hancock v. Train*, 426 U.S. 167 (1976). These statutory provisions conclusively support a finding that the purposes clause of Section 101 (b) (1) is logically related to the express provi-

[25]Id. at 1139; (A. 86a-87a).

sions of the Act, Sections 108, 109 and 110 rather than an undefined policy of prevention of significant deterioration.

Even though a review of the legislative history of the Act is unwarranted, the lack of authorization for the regulations is further demonstrated by such history. The origins of the purposes clause, the Clean Air Act amendments of 1963 and 1967, were not based, even in part, on a policy of no-significant deterioration. The legislative history of these statutes demonstrates that this legislation was a product of Congress' concern over critically polluted areas, not clean air areas.

There is also no support in the legislative history of the 1970 amendments for the establishment of a policy for prevention of significant deterioration. There is no express reference to such a policy or requirement in any of the early legislation leading up to these amendments. To the extent that Congress was concerned in 1970 over protecting existing clean air, the legislative history shows that new source performance standards were designed to assure the maintenance of such clean air. In the absence of any clear recognition of such a policy or any reference to the establishment of a mechanism for prevention of significant air quality deterioration, it must be concluded that such a policy was not intended by Congress.

The contemporaneous interpretation by EPA of the Act's requirements further indicates that the implementation of such a policy was never considered until, under court order, EPA was forced to promulgate these regulations. Such administrative interpretation of the Act's requirements must be accorded great weight and supports a finding that these regulations are unauthorized and should be overturned.

Even assuming that regulations to prevent significant air quality deterioration are authorized under the Act, these regulations unlawfully infringe upon the authority of the

States under the Act. The States are expressly reserved the primary responsibility for assuring air quality within their boundaries and are authorized to establish substantive air control standards for both federal and non-federal sources of pollution. These regulations, by granting Federal land managers and Indian governing bodies the power to redesignate any lands which are subject to their jurisdiction, allow these authorities to effectively dictate the uses and growth potential of adjacent State and private land areas because of the drift restrictions of the Class I and Class II increments. These regulations thereby abrogate the states authority to determine to what extent the air emissions from such lands should be controlled. This conferral of authority to Federal land managers and Indian governing bodies is not authorized under the Act and should warrant this Court's vacating these regulations.

ARGUMENT

The Clean Air Act does not authorize the promulgation of regulations by the Environmental Protection Agency to prevent significant deterioration of air quality.

The preamble to the Clean Air Act Amendments of 1970, which is set forth in Section 101, includes the following recital of purpose among others:

> "[T]o protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the production capacity of its population."[26]

Notwithstanding the fact that there are over fifty substantive provisions which follow this statement of purpose, none of which refer to a requirement for "prevention of significant deterioration of air quality" the Court below con-

[26] § 101(b)(1), 42 U.S.C. § 1857(b)(1).

cluded that this statement in the preamble to the Act justifies EPA's establishment of regulations for prevention of significant deterioration. This conclusion is neither supported by nor consistent with the express provisions of the Act, its legislative history or the contemporaneous administrative interpretation of its requirements.

A. The Substantive Provisions of the Act do not authorize these Regulations.

The reliance by the Court below upon one statement of purpose in the Act as establishing a substantive mandate for prevention of significant deterioration is clearly a misplaced one. In the first place, a decision which is so central to the overall scope of the Act should obviously not hinge on one expression of purpose. As this Court has recognized, in determining the intent of Congress, consideration must be given *to the statute as a whole* or in its entirety, *not just to a single provision.*[27] Moreover, where the substantive provisions of a statute are clear and unambiguous, a preamble merely setting forth the purposes of a statute *cannot prevail* over those specific provisions.[28] Applying these long-standing principles, this Court must determine that the substantive provisions of the Clean Air Act support and are consistent with these regulations in order to warrant their being upheld. A review of these statutory provisions reveals numerous inconsistencies with any requirement for prevention of significant deterioration.

To begin, the substantive provisions of the Act are framed around a central element of air pollution control —

[27] *Richards v. U.S.*, 369 U.S. 1, 11 (1962); *U.S. v. American Trucking Associations, Inc.*, 310 U.S. 534, 594 (1940); *Helvering v. New York Trust Co.*, 292 U.S. 455, 464 (1934).

[28] *Carter v. Carter Coal Co.*, 298 U.S. 238, 290 (1936); *Hughes Tool Co. v. Meier*, 486 F. 2d 593, 596 (10th Cir. 1973); *Bissette v. Colonial Mortgage Corporation of D.C.*, 477 F. 2d 1245, 1246 (D.C. Cir 1973).

the national ambient air quality standards. By definition, the primary and secondary standards are established to provide comprehensive protection of the public health and welfare from *any and all adverse effects of air pollutants,* whether "known or anticipated."[29] Thus, assuming that these standards are achieved, no identifiable harm to air that is better than the national standards can be shown and accordingly, no "significant" effect can be proven. If any additional adverse effect from any air pollutant is discovered, the Act expressly provides that the national standards and air quality criteria should be revised to insure protection against such effect.[30] Accordingly, any additional substantive requirement for prevention of significant deterioration is inconsistent with the statutory requirements for the attainment and maintenance of the national standards.[31]

[29] § 109(b), 42 U.S.C. § 1857c-4(b) is as follows:

"(b)(1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and *allowing an adequate margin of safety,* are *requisite to protect the public health.* Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is *requisite to protect the public welfare from any known or anticipated adverse effects* associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated." (Emphasis added).

§ 302(h), 42 U.S.C. § 1857(h) provides: "All language referring to *effects on welfare,* includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well being."

[30] § 108(a)(1) and (c), 42 U.S.C. § 1857c-3(a)(1) and (c); § 109, 42 U.S.C. § 1857c-4.

[31] Mr. William Ruckelshaus, former Administrator of EPA, has also pointed out that a non-deterioration policy does not make sense in the context of air quality standards which by definition protect against all adverse effects of pollution. *Hearings on the Implementation of the*

Secondly, Section 111[32] of the Act was purposefully established to protect existing air quality from pollution caused by the establishment of new sources of pollution in all areas including those where the air quality exceeds the national standards.[33] Section 111 (b) (1) authorizes EPA to promulgate standards of performance for new stationary sources of pollution. These standards must reflect "the degree of emission limitation achievable through the application of the *best system of emission reduction* which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated."[34] Through this requirement, EPA can establish the most stringent standards feasible for new sources of pollution. To permit EPA to impose additional substantive requirements on new sources in order to prevent significant deterioration would completely obviate the need and purpose of Section 111.

Thirdly, to the extent that additional air quality protection is desired over and beyond that assured through the attainment of national standards and new source performance standards, Congress *specifically reserved for each state* through Section 116 of the Act the right to establish and enforce any more stringent air standards or limitations as it deems fit.[35] This right is also affirmed in Sections 101 (a) (3) and 107 (a) of Act wherein the Act provides that the *states shall have the primary responsibility for control of air pollution under the Act.* Accordingly, many states

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Clean Air Act Amendments of 1970 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works, 92nd Cong. 2d Sess. 273-274 (1972).

[32]§ 111, 42 U.S.C. § 1857c-6.

[33]For a discussion of the legislative history of Section 111, see *National Asphalt Pavement Assn. v. Train,* 539 F. 2d 775, 783 (D.C. Cir 1976); See also pages 24-27 infra.

[34]§ 111(a)(1), 42 U.S.C. § 1857c-6(a)(1).

[35]§ 116, 42 U.S.C. § 1857d-1.

have already taken steps to adopt regulations which go beyond attainment of national ambient air standards, including specific provisions to insure prevention of air quality deterioration.[36] Therefore, any substantive requirement for protection of air quality beyond that established pursuant to Sections 108, 109, 110 and 111 conflicts with Section 116 and renders the states discretionary authority under the Act illusory and meaningless. The implementation of an additional requirement for prevention of significant deterioration effectively destroys this statutory scheme.

Finally, the most glaring inconsistency between the Act and these regulations are the specific terms of § 110 (a) (2) of the Act. This Court has recently reaffirmed that EPA is required to approve any state implementation plan if it has been adopted after public notice and hearing *and* if it satisfies the eight specified conditions contained in Section 110 (a) (2). *Train v. NRDC,* 421 U.S. 60 (1975).

In the decision of *Train v. NRDC,* Justice Rehnquist spoke to this requirement:

> "Under § 110 (a) (2), the Agency is *'required'* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a state's choices of emission limitations if they are part of a plan which satisfies the standards of § 110 (a) (2) and the Agency may devise and promulgate a specific plan of its own only if a state fails to submit an implementation plan which satisfies those standards."[37]

More recently, this Court restated this conclusion in its opinion in *Hancock v. Train,* 426 U.S. 167 (1976):

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[36]38 Fed. Reg. 18986 (July 16, 1973), (A. 91a).

[37]421 U.S. 60, 79 (1975).

> "EPA was required to approve each state's implementation plan as long as it was adopted after public hearings and satisfied the conditions specified in § 110 (a) (2) ."[38]

In a subsequent opinion of Justice Marshall, in *Union Electric v. EPA*, 427 U.S. 246 (1976), this interpretation of Section 110 (a) was reiterated:

> "As we have previously recognized, the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution. The Amendments place the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject to the States to strict minimum compliance requirements. These requirements are of a "technology-forcing character," Train v. NRDC, 421 U.S., at 91, and are expressly designed to force regulated sources to develop pollution control devices that might at the time appear to be economically or technologically infeasible.
>
> "This approach is apparent on the face of § 110 (a) (2) . *The provision sets out eight criteria that an implementation plan must satisfy, and provides that if these criteria are met and if the plan was adopted after reasonable notice and hearing, the Administrator "shall approve" the proposed state plan. The mandatory "shall" makes it quite clear that the Administrator is not to be concerned with factors other than those specified,* Train v. NRDC, 421 U.S., at 71 n. 11, 79, and none of the eight factors appears to permit consideration of technological or economic infeasibility."[39]

Therefore, following the precedent established by this Court, EPA is *not* authorized to disapprove state implementation plans which fail to provide for prevention of significant deterioration, since such a requirement is *not* included among the eight criteria of Section 110 (a) (2) . It is within

[38]426 U.S. 167, 169-170 (1976).

[39]427 U.S. 246, 257 (1976), (emphasis added).

the sole discretion of the states to establish requirements as part of State plans in addition to those specified in Section 110 (a) (2) .[40]

Notwithstanding the specific requirements of Section 110 (a) (2) , the Court below held that the *Train* and *Union Electric Co.* decisions were not controlling. The Court attempted to distinguish these decisions by stating that the issue of significant deterioration was not considered by this Court in those cases, nor was the issue of whether the "shall approve" language of Section 110 (a) (2) can be read to preclude a mandatory requirement for the prevention of significant deterioration. However, in making such distinctions, the Court below completely disregarded the express findings of those decisions.

In *Train*, this Court had to determine whether variances from state implementation plan requirements could be treated as "revisions" to state plans under Section 110 (a) (3) or could only be granted as postponements under Section 110 (b) . Following a thorough analysis of the Act and its legislative history, the Court found that Section 110 (a) (3) can be utilized for approval of variances so long as attainment of the national primary standards is not compromised. In addition, the Court specifically recognized that approval of variances as revisions to state plans under Section 110 (a) (3) could be made *only* if the plans otherwise satisfied the requirements of Section 110 (a) (2) .[41] This

[40]Congress' intent as to the requirements for State plans is further confirmed by subsequent legislation, Energy Supply and Environmental Coordination Act of 1974, Pub. L. 93-319, 88 Stat. 246. In allowing EPA to notify states whose restrictions on fuel-burning stationary sources in their state plans may be relaxed without interfering with the attainment of national air quality standards, Congress reaffirmed that states are not required to provide for more stringent restrictions on air emissions than those necessary to insure attainment of the national standards. The States still maintain the discretion and authority to impose more restrictive conditions, if they so desire.

[41]421 U.S. 60, 98 (1975).

finding necessarily required the Court to decide what are the mandatory requirements for state plans which it found to be only the eight criteria set forth in Section 110 (a) (2).

Likewise, in *Union Electric Co.*, this Court also reviewed the requirements of Section 110 (a) (2). The issue in that case was whether the economic or technical infeasibility of a state plan should be considered by EPA upon its review of the plan. In resolving this issue, this Court had to decide the scope of EPA's responsibility in approving or rejecting a state plan. Upon a review of Section 110 (a) (2), it was determined that the language of this provision "provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible."[42] It must logically follow, therefore, that Section 110 (a) (2) also provides no basis for EPA ever to reject a state implementation plan because it fails to provide for prevention of significant deterioration.

Without support among the substantive provisions of the Act and specifically Section 110, these regulations are due to be overturned regardless of the language contained in the preamble of the Act. However, in view of the statutory scheme established through Sections 108, 109, 110 and 111 of the Act, it seems much more reasonable to conclude that the purposes clause contained in Section 101 (b) (1) does not relate to prevention of significant deterioration but to the protection of public health and welfare through the national ambient air standards. By definition, these standards provide the necessary protection and enhancement of the quality of the air "so as to promote the public health and welfare and the productive capacity of [the Nation's] population." Only through this interpretation can the purposes clause be harmonized with the substantive provisions of the Act thereby avoiding any need for the resolution of a

[42]427 U.S. 246, 265 (1976).

conflict within the express provisions of the Act, a problem which Congress obviously did not intend to create.

B. The Legislative History of the Act does not support these Regulations.

Because the purposes clause of Section 101 (b) (1), as properly interpreted, does not conflict with the unambiguous substantive provisions of the Act, reliance upon the legislative history is not warranted.[43] Moreover, the legislative history of the Act cannot create a construction of the statutory provisions which is at variance with its plain words and meaning;[44] nor can a purpose be imputed to Congress through the legislative history which is not supported by the face of the statute itself.[45] Consequently, this Court should not feel compelled to review the legislative history of the Clean Air Act in order to determine whether prevention of significant deterioration is required. However, assuming that this Court may desire to review the full background of this Act so as to determine the legislative intent, the following review of the history of the Clean Air Act Amendments of 1970 and particularly the purposes clause, is submitted to demonstrate that a requirement for prevention of significant deterioration was never intended by Congress.

1. *The Purposes Clause of Section 101(b)(1)*

Upon reviewing the legislative history of the purposes clause contained in Section 101 (b) (1), the Court below

[43]*U.S. v. Oregon*, 366 U.S. 643 (1961); *U.S. v. Great Northern R. Co.*, 343 U.S. 562 (1951).

[44]*Kuehner v. Irving Trust Co.*, 299 U.S. 445 (1936).

[45]*Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 602 (1945); *Cheng Ho Mui v. Rinaloi*, 262 F. Supp. 258, 263 (DN.J. 1966); *United States Fidelity and Guaranty Co. v. Long*, 214 F. Supp. 307, 315 (D.OR. 1963); *U.S. v. One Solid Gold Object in Form of a Rooster*, 208 F. Supp. 99, 103 (D. NEV. 1962).

concluded that the origin of the "protect and enhance" language was the Air Quality Act of 1967.[46] The Court mistakenly overlooked the fact that the "protect" portion of that clause was first enacted as part of the Clean Air Act of 1963.[47]

Section 1 (b) (1) of the 1963 Act contained the following language:

> "(b) The purposes of the Act are —
> (1) *to protect* the Nation's air resources so as to promote the public health and welfare and the production capacity of its population; . . ."[48]

The legislative history of this Act indicates that Congress' intent was to completely revise the existing law by increasing federal authority over air pollution research, training and demonstration and over interstate pollution problems to a certain extent.[49] There were no statutory requirements included for the establishment of ambient air standards, merely the creation of federal authority for research and development of air quality criteria. The provisions for abatement of air pollution were specifically related to air pollution which "*endangers the health and welfare* of any persons."[50] Nowhere in these provisions or in the legislative history is there reference to a policy of non-deterioration or a concern over protection of air which is cleaner than that necessary to protect health and welfare.

The "enhance" portion of the purposes clause did, however, originate in the Air Quality Act of 1967.[51] This Act,

[46]Pub. L. No. 90-148, 81 Stat. 485.
[47]Pub. L. No. 88-206, 77 Stat. 392.
[48]Id. at § 1(b)(1), (emphasis added).
[49]1963 U.S. Code Cong. and Admin. News 1260, 1262 (1963).
[50]§ 5, Pub. L. No. 88-206, 77 Stat. 392; 1963 U.S. Code Cong. and Admin. News 455, 456 (1963).
[51]§ 101(b)(1), Pub. L. No. 90-148, 81 Stat. 485; H. Rep. No. 728, 90th Cong. 1st Sess. (1967); 1967 U.S. Code Cong. and Admin. News 1938, 1965 (1967).

which amended the Clean Air Act of 1963 and its amendments of 1965 and 1966,[52] also increased federal authority over air pollution control, while establishing a new procedure for states to adopt national standards and plans for achieving those standards:

> "Its provisions, however, increased the federal role in the prevention of air pollution, by according federal authorities certain powers of supervision and enforcement. But the States generally retained wide latitude to determine both the air quality standards which they would meet and the period of time in which they would do so."[53]

While the legislative history does not reveal any specific reason for the addition of the words "enhance the quality of" in the purposes clause, it could reasonably be assumed that the change related to some change in or addition to the substantive provisions of the Act. The most logical statutory change to which these words relate is that in Section 109 which was a newly enacted provision:

> "*Standards to achieve Higher Level of Air Quality*"
> Sec. 109 Nothing in this title shall prevent a State, political subdivision, intermunicipal or interstate agency from adopting standards and plans to implement an air quality program which *will achieve a higher level of ambient air quality* than approved by the Secretary."[54]

Because the word "enhance" has been defined as meaning "to make greater, intensify or increase,"[55] it could be reasonably concluded that Section 109 was intended to reaffirm

[52]Pub. L. No. 89-272, 79 Stat. 992; Pub. L. No. 89-675, 80 Stat. 954.
[53]*Train v. NRDC*, 421 U.S. 60, 64 (1975); See also, 1967 U.S. Code Cong. and Admin. News 1938 (1967).
[54]§ 109, Pub. L. No. 90-148, 81 Stat. 485 (emphasis added); 1967 U.S. Code Cong. and Admin. News at 530 and 1971 (1967).
[55]*Webster's New World Dictionary, College Edition* 482 (1957).

the States' discretionary right to establish more stringent ("greater") controls to achieve one of the Act's express purposes — to "enhance the quality of" the air.

Even if it is assumed that the addition of these words to the purposes clause was not related to any change in the statutory provisions, there is absolutely no indication in the legislative history of the 1967 Act that these words were intended to establish a mandate for prevention of significant deterioration. In fact, the legislative history of the 1967 Act shows that Congress' real concern was areas whose air would deteriorate below levels required to protect public health and welfare, that is, areas which were critically polluted:

> "The fact that an area is not now a problem area will not mean that controls will never be required. When the air quality of any region deteriorates below the level required to protect public health and welfare, the Secretary is required to designate that region for the establishment of air quality standards . . . It should be pointed out in this connection that the Public Health Service has expressed the view that every urban area of 50,000 or more population now has an air pollution problem."[56]

This passage strongly supports a finding that the 1967 Act did not deal with absolute protection of clean air areas for which a policy of non-deterioration would be designed.

In addition, it seems more likely that the word "protect", which has been defined as meaning "to shield from injury, danger or loss; guard; defend,"[57] would be related to prevention of the deterioration of clean air rather than the word "enhance". However, neither the Court below nor any party to this action has ever maintained that the 1963

[56]S. Rep. No. 90-403, 90th Cong., 1st Sess. 4 (1967).

[57]*Webster's New World Dictionary, College Edition* 1170 (1957).

Act, from which the "protect" language originates, embodies or requires the implementation of a policy for prevention of significant deterioration.

2. *The Substantive Provisions of the Act*

The Court below also concluded that a policy of non-deterioration of air quality was generally accepted at the time of the Clean Air Act Amendments of 1970. This was said to be shown by several ambiguous statements made by HEW officials during Senate Hearings and one passage from Senate Report No. 91-1196, which was considered out of context.[58] A complete review of the legislative history of the 1970 Act, however, demonstrates just the opposite.

The early legislative bills in 1970 which set forth amendments to the Act established a general framework for federally adopted national air standards, state plans to meet those standards, and new source emission controls, with the added recognition of the states' right to adopt more stringent requirements.[59] There was no mechanism established for implementing a so-called policy of prevention of significant deterioration. The House version of the 1970 Amendments, H.R. 17255,[60] which was introduced on April 27, 1970, also did not contain any provision for prevention of significant deterioration nor did it provide any requirement that state implementation plans include non-deterioration

[58]540 F. 2d 1114, 1125 (D.C. Cir 1976); (A. 56a-58a).

[59]The first Senate bill was introduced in December, 1969 by Senator Muskie and others. S. 3229, 91st Cong. 1st Sess. (1969). In early 1970, two identical bills were introduced with the support of the Nixon Administration. S. 3466, 91st Cong. 2nd Sess. (1970); H.R. 15848, 91st Cong. 2nd Sess. (1970). In addition, another bill was introduced by Senator Muskie in March, 1970. S. 3546, 91st Cong. 2nd Sess. (1970); See also, *A Legislative History of the Clean Air Act Amendments of 1970 (compiled for the committee on Public Works, U.S. Senate, by the Library of Congress)*, Vol. 2, p. 1451-1539 (1974) (hereinafter Leg. Hist.).

[60]H.R. 17255, 91st Cong., 2d Sess. (1970); 2 Leg. Hist. 910.

provisions. The House Committee Report on this bill indicates that control over existing and new pollution problems under this legislation was intended to be achieved through the national standards and new source emission standards and that any additional requirements would be left to the discretion of the States.[61]

Senate Bill 4358,[62] which was introduced on September 17, 1970 by Senator Muskie, also did not provide for the establishment of substantive requirements for prevention of significant deterioration. The Senate Committee on Public Works, upon reporting out this bill, stated that protection of existing clean air quality would be achieved under this legislation through provisions for national ambient air standards and new source standards:

> "Although the nature of the attack will differ from region to region, one objective will be the same: Air quality standards protective of the health of persons must be achieved within the 3-year period of the approval of plans to implement ambient air quality stan-

[61]H.R. Rep. 91-1146, 91st Cong., 2nd Sess. (1970); 2 Leg. Hist. 891-909. The right of the states to establish additional requirements under this legislation was emphasized by Rep. Staggers of West Virginia during the House debate:

> "Mr. Chairman, in response to the statement of the gentleman from New York (Mr. Farbstein), I might say any State can have *more stringent* ambient air quality standards *if they want to.* If a State plan is presented to the Secretary, to carry out such stricter standards I am sure it will be approved. I hope the gentleman is listening because no one is preventing any State from having stronger standards and a State plan designed to carry out such standards.
>
> "We would hope that this would take care of any State that says they have peculiar problems. We are not holding them back, but we say that all of the States must comply with the nationwide standards. We think that at the present time this is the best we can do. If any State wants stronger standards, we think it will know best what it should do and how far it should go. But if any State does not come up with a State plan to the satisfaction of the Federal Government then the Federal Government will step in and establish a plan for such State." 2 Leg. Hist. 807. (emphasis added).

[62]S. 4358, 91st Cong., 2nd Sess. (1970); 1 Leg. Hist. 531.

> dards. The right of States to set more stringent standards of air quality has been preserved. *Maintenance of existing high quality air is assured through provision for maximum control of new major pollution sources.*
>
> • • •
>
> "The overriding purpose of this section [Section 113, Later 111] would be to prevent new air pollution problems, and toward that end, maximum feasible control of new sources at the time of their construction is seen by the committee as the most effective and, in the long run, the least expensive approach."[63]

In its report, the Senate Committee also referred to control over areas where existing air quality is better than the national standards (now known as primary standards) and goals (now known as secondary standards) :

> "The bill would not require the attainment of the air quality goals within a specified time period. Nevertheless, it is the Committee's view that progress in this direction should be made as rapidly as possible. In areas where air pollution levels are already relatively low, the attainment and maintenance of these goals should not require an extended time period. In areas where current air pollution levels are already equal to, or better than, the air quality goals, the Secretary should not approve any implementation plan which does not provide, to the maximum extent practicable, for the continued maintenance of such ambient air quality. Once such national goals are established, deterioration of air quality should not be permitted except under circumstances where there is no available alternative. Given the various alternative means of preventing and controlling air pollution — including the use of the best available control technology, industrial processes, and operating practices — and care in the selection of sites for new sources, land use planning and traffic controls — deterioration need not occur."[64]

[63]S. Rep. 91-1196, 91st Cong. 2d Sess. (1970); 1 Leg. Hist. 402 and 416.
[64]Id. at 411.

This statement was relied upon by the Court below as giving "express recognition to the concept of non-deterioration."[65] However, the statement was extracted from a passage of the Senate Report dealing with the *attainment of air quality standards and goals* (now known as secondary standards). Considering the context in which this statement was made, it is much more logical that this statement means that the Agency (EPA) should ensure that air quality in areas where the air quality is equal to or better than the goals does not become worse than those goals (secondary standards) once they are established. Thus, given the prescribed methods for control under the Act, "deterioration need not occur." If, on the other hand, this statement were to be interpreted to mean that clean air must be kept from deteriorating at all *regardless* of the existence of the goals or any other method of control, it would be unnecessary to wait until the goals were established. This interpretation is clearly inconsistent with the scheme established by the express provisions of Senate Bill 4358.

During the Senate debate on Senate Bill 4358, Senator Muskie outlined the basic means of control over air pollution under these amendments: achievement of national ambient air standards, and goals (now secondary standards), achievement of national standards of performance by new sources, prevention of hazardous substance emission, and emission control of selected pollutants. Specifically, as to controls over new sources, Senator Muskie emphasized the following:

> "Third, the bill provided that newly constructed sources of pollution had to meet rigorous national standards of performance. While we cleaned up existing pollution, we were determined to *guard against new problems*. Those areas which have levels of air quality

[65]540 F. 2d 1114, 1125 (D.C. Cir 1976); (A. 57a).

> better than the national standards should not find their air quality *degraded* by the construction of new sources."[66]

Senator Randolph and Senator Cooper expressed similar opinions about the new source standards of performance.[67] These statements strongly suggest that the new source standards were intended to protect existing clean air to the extent that Congress was concerned with such protection. There is absolutely no indication that Congress intended that states must also insure the prevention of significant deterioration through additional substantive requirements. In fact, it seems almost preposterous to suggest that Congress would intend such a requirement with its serious political and economic problems without giving express and detailed attention to it throughout the Congressional reports and debate.

The Conference Committee, upon consideration of House Bill 17255 and the Senate amendments to that bill, submitted its report but also *made no reference to a policy of or a substantive requirement for prevention of significant air quality deterioration.*[68] Also, during Senate consideration of Conference Report 91-1783, Senator Muskie and Senator Randolph reaffirmed that new source standards to be established under this legislation were intended to control new pollution problems by preventing degradation of existing air quality.[69] Neither Senator stated that the 1970 amendments would require States to prevent significant air quality deterioration.

[66]1 Leg. Hist. 227, (emphasis added).

[67]1 Leg. Hist. 289 (Senator Randolph); 1 Leg Hist. 260 (Senator Cooper).

[68]Conf. Rep. No. 91-1783, 91st Cong. 2d Sess. (1970); 1 Leg. Hist. 151-209.

[69]1 Leg. Hist. 125 (Senator Muskie); 1 Leg. Hist. 144-145 (Senator Randolph).

The above-cited legislative history fully explains the absence of any statutory provision in the Act requiring states to provide for prevention of significant deterioration. Congress obviously did not intend to impose such a requirement for which it made no provision in the Act. Senator Baker, the ranking Republican Senator on the subcommittee which drafted the Senate Bill, has subsequently reaffirmed this fact:

> "I was on the subcommittee in 1967 when we came to terms with this and in 1970 with the clean air amendments and I stand subject to correction by the staff and other members if I am in error, but it is my recollection and it is my interpretation of the statute as passed that nondegradation is a term that was never embodied nor embedded in the statute itself."[70]

In addition, Congress has made repeated recent attempts to establish a precise framework for implementing a policy for preventing significant deterioration.[71] Several members of Congress have expressly recognized that the attempts to adopt this requirement are due to the lack of a policy of non-deterioration in the 1970 Act.[72] While these comments

[70] *Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92d Cong. 2d Sess. 275 (1972).

[71] During the previous session of Congress, both the Senate and the House passed bills which contained amendments to the Clean Air Act providing for prevention of significant air quality deterioration. S. 3219 and H.R. 10498, 94th Cong. 2d Sess. (1976). A compromise provision was reported out of Conference Committee on September 30, 1976, debated, but was not passed by Congress. The Senate and the House are presently considering new bills which also contain detailed provisions for prevention of significant air quality deterioration. S. 252, S. 253 and H.R. 4151, 95th Cong., 1st Sess. (1977).

[72] S. Rep. No. 94-717, 94th Cong. 2d Sess. (1976) at 105 (Senator Gravel) and at 118 (Senator McClure); H. Rep. No. 94-1175. 94th Cong. 2d Sess. (1976) at 445-446 (Rep. Satterfield) and at 488-489 (Reps. Devine, Broyhill, Carter, Brown, Skubitz, Collins and McCollister); 122 Cong. Rec. No. 112, at S. 12465 (Senator Baker); 122 Cong. Rec. No. 119, at H. 8296 (Rep. Rogers).

by members of Congress on subsequent legislation should not be used to determine the intent of the 1970 Act,[73] they do indicate the ongoing attempts of Congress to resolve this issue. In view of these recent efforts, it is imperative that this Court permit Congress to resolve the question of whether there should be requirements for prevention of significant air quality deterioration. As this Court has stated it:

> "Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest."[74]

Congressional action would certainly be far preferable to what could result in unwarranted "judicial legislation" if these regulations are permitted to stand.[75]

C. EPA's Contemporaneous Interpretation of the Act Does Not Support these Regulations.

The administrative interpretation of the Act must also be considered in deciding whether any statutory authority exists for these regulations, for as this Court has long recognized, great weight should be given to the interpretation given by the agency charged with its administration.[76] However, the Court below refused to recognize that EPA did not interpret the Act to require that states provide for prevention of significant air quality deterioration through their state plans, but only did so under court order.[77] In its initial regulations setting forth the requirements for state imple-

[73] *Watterman, S.S. Corp. v. U.S.*, 381 U.S. 252, 269 (1965).

[74] *Hancock v. Train*, 426 U.S. 167, 198 (1976).

[75] Justice Douglas, in following the words of Justice Holmes, recently stated that this Court should legislate only "interstitially" and that it is up to Congress to resolve issues which require "massive or molar action." *Saxbe v. Bustos*, 419 U.S. 65, 79-80 (1974).

[76] *Fry v. U.S.*, 421 U.S. 542 (1975); *Saxbe v. Bustos*, 419 U.S. 65, 74 (1974).

[77] *Sierra Club v. Ruckelshaus*, 344 F. Supp. 253 (D.D.C. 1972).

mentation plans, EPA gave its view of what should be required of states to insure protection of clean air areas:

> "In any region where measured or estimated ambient air levels of a pollutant are below the levels specified by an applicable secondary standard, the plan shall put forth a control strategy which shall be adequate to prevent such ambient pollutant levels from exceeding such secondary standard."[78]

This provision makes it clear that EPA did not deem it necessary to require states to do more under their State plans than insure the attainment and maintenance of secondary ambient air standards.

Even when it promulgated these regulations, EPA maintained its position that prevention of significant deterioration is not required under the Act:

> "In the absence of a definitive judicial decision on the issue, the Administrator adheres to the view that Section 110 of the Clean Air Act requires EPA to approve State implementation plans that will attain and maintain the national ambient air quality standards, and that *the Act does not require EPA or the States to prevent significant deterioration of air quality*. The proposed alternative regulations set forth herein would establish a mechanism for preventing significant deterioration pursuant to the preliminary injunction issued by the District Court."[79]

Mr. William Ruckelshaus, as Administrator of EPA during Congressional hearings in 1972 on the implementation of the Act, also stated that EPA did not interpret the Act to require prevention of significant deterioration.[80]

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[78] 40 C.F.R. § 51.12(b).

[79] 38 Fed. Reg. 18986 (July 16, 1973) (emphasis added); (A. 93a).

[80] *Hearings on Implementation of the Clean Air Act Amendments of 1970 before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 92nd Cong., 2d Sess. 272-275 (1972).

These statements when considered along with the specific provisions of the Act and their legislative history provide abundant support for this Court's finding that these regulations are unlawful and due to be overturned.

The Clean Air Act does not authorize the promulgation of regulations by the Environmental Protection Agency which grant to Federal land managers and Indian governing bodies power to reclassify Federal and Indian lands.

A. The Act authorizes the States to prevent and control air pollution within their boundaries.

As this Court recently recognized, the Clean Air Act of 1970 preserved the principle that "the prevention and control of air pollution at its source is the primary responsibility of State and local governments."[81] This principle is more explicitly stated in Section 107 (a) :

> "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State . . ."[82]

In *Train v. NRDC*, this Court in speaking to Section 107 (a) , also reaffirmed the role of the States in establishing state plans under the Act:

> "We also believe that Congress, consistent with its declaration that, "Each State shall have the primary responsibility for assuring air quality" within its boundaries, 107 (a) , left to the States considerable latitude in determining specifically how the standards would be met."[84]

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[81] *Train v. NRDC*, 421 U.S. 60, 64 (1975).

[82] § 107(a), 42 U.S.C. § 1857c-2(a).

[83] § 116, 42 U.S.C. § 1857d-1.

[84] *Train v. NRDC*, 421 U.S. 60, 86-87 (1975).

In *Union Electric Co. v. EPA*, upon determining that EPA is not required to consider the technological and economic feasibility of a state plan prior to approving it, the Court stated the following:

> "And it would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though *Congress plainly left with the States*, so long as the national standards were met, *the power to determine which sources would be burdened by regulation and to what extent*."[85]

Section 118 also confirms the States' authority under the Clean Air Act and their right to establish air quality standards for federal as well as non-federal sources of air pollution.[86] This statutory provision clearly obligates all federal installations and facilities to comply with the standards, limitations and compliance schedules established by the States under the Act. Thus, Section 118 is an extension of Congress' recognition of the States' authority and responsibility under the Act.

In the recent decision of *Hancock v. Train*, this Court emphasized that Congress, in adopting Section 118, intended to require federal installations "to abate their pollution *to the same extent* as any other air contaminant source and under standards which the *States* have prescribed . . ."[87] While holding that federal installations are not subject to state permit requirements, the Court affirmed that federal sources of pollution *are subject to the States authority to establish substantive requirements* under the Act for all sources of air pollution with a State's geographical boundary.

Considering the clear language of these statutory provisions and the decisions of this Court, EPA is not authorized

[85]*Union Electric Co. v. EPA*, 427 U.S. 246, 269 (1976) (emphasis added).
[86]§ 118, 42 U.S.C. § 1857f.
[87]*Hancock v. Train*, 426 U.S. 167, 198-199 (1976).

to infringe upon or limit in any way the States statutory powers and responsibilities under the Act.

B. EPA's Regulations for Prevention of Significant Deterioration Abrogate the Authority of the States under the Act.

Even assuming that these regulations are otherwise authorized by the Clean Air Act, the grant of authority to Federal and Indian authorities under these regulations is clearly unauthorized.[88] These regulations confer authority upon the States to propose the redesignation of all areas within a state to Class I, II or III.[89] Such redesignation is subject to approval by EPA.[90] In addition, however, Federal land managers are given the authority to propose redesignation of any Federal lands within a state to a more restrictive designation[91] and Indian governing bodies may propose redesignation of any Indian reservation over which a state has not assumed jurisdiction.[92]

Upon establishing these provisions, EPA gave the following explanation of its reasons for allowing Federal land managers and Indian governing bodies to retain such authority:

> "Various public comments indicate that Federal lands should be subject to State jurisdiction. EPA did not intend to preclude State redesignations provided that the Federal Land Manager can elect to keep the air quality over Federal lands in a more pristine condition

[88]The Court below refused to address this question because it found the issue to be "not yet ripe for review." 540 F. 2d 1114, 1139 (1976) (A. 86a).
[89]40 C.F.R. § 52.21(c)(3)(ii); (A. 230a); All areas were originally designated Class II under these regulations. Id. at § 52.21(c)(3)(i); (A. 230a).
[90]Id. at 52.21(c)(3)(vi); (A. 232a).
[91]Id. at 52.21(c)(3)(iv); (A. 231a).
[92]Id. at 52.21(c)(3)(v); (A. 232a).

than the State might designate. Therefore, the regulations have been revised to subject Federal lands to State redesignations but reserve to the Federal Land Manager the authority to subject such lands to a more stringent designation. This approach is consistent with section 118 of the Clean Air Act (42 U.S.C. 1857f) which requires that Federal agencies having jurisdiction over any property or facility meet substantive State air pollution control standards and limitations. There is nothing in the Clean Air Act or the legislative history of that Act that indicates the Congress intended to preclude the Federal Government from meeting more restrictive standards than are imposed by the States. This provision also ensures that national forests and parks can be protected by the Federal Government from deterioration of air quality."[93]

From this statement, it appears that EPA desires to insure that Federal and Indian authorities have the right to require more stringent air quality conditions for certain lands than the States might impose and therefore, in order to do this, Federal land managers and Indian governing bodies are allowed to redesignate their lands to a more stringent classification. If these regulations conferred limited authority upon Federal and Indian authorities to achieve *only* this purpose, which seems to be a reasonable one, there would be little disagreement with this part of the regulations, even though the Act does not speak to the right of any authority to establish for its facilities more stringent standards than the States may impose. However, these regulations go far beyond this proposition. Because the restrictions of a classification under these regulations *reach beyond the boundaries of the Federal and Indian area* so designated, the authority of the Federal and Indian officials thereby effectively extends into areas which are *exclusively* within the control and regulation of the States under the Act.

[93]39 Fed. Reg. 42510, 42513 (December 5, 1974); (A. 221a-222a).

The reality of this unlawful extension of authority is well illustrated by EPA in the preamble to these regulations:

> "Calculations have shown that because of the small air quality increments specified for Class I areas, *these levels can be violated by a source located many miles inside an adjacent Class II or III area.* For example, a power plant which just meets the Class II increment for SO_2 could under some conditions violate the Class I increment for SO_2 60 or more miles away. *Under the regulations promulgated below, a source could not be allowed to construct if it would violate an air quality increment either in the area where the source is to be located or in any neighboring area in the State.* Therefore, wherever a Class I area adjoins a Class II or III area, the *potential growth restrictions,* especially for power plant development, *extend well beyond the Class I boundaries* into the adjacent areas. A similar situation exists, to a greater or lesser degree wherever areas of different classification adjoin each other. Therefore, the area with the less restrictive classification should include an additional area at the periphery where it is clearly recognized that development will be somewhat restricted due to the adjacent "cleaner" area. As a result, a Class I redesignation could be fairly limited in size, yet the adjoining Class II or Class III areas would need to cover a substantial area in order to fully utilize the Class II or III increment. Again, it should be clear that the Class II or III increment could only be fully utilized toward the center of the area and that at the periphery, *allowable deterioration will be dictated by the adjoining Class I area rather than the Class II or III increment.*"[94] (Emphasis added).

The potential infringement upon State and private lands which are adjacent to Federal lands is well demonstrated by the fact that EPA has already expressly recommended that the vast Federal lands now utilized as national forests, parks

[94]Id. at 42512; (A. 218a-219a); EPA also recently proposed for public comment the approval of the redesignation of the Northern Cheyenne

and wildlife reserves be redesignated as Class I areas.[95] Because these Federal lands constitute large portions of many States and thus will limit air pollution many miles from their boundaries, the extension of Federal authority throughout these States will be overwhelming.

While the Act may not preclude Federal authorities from meeting more stringent air pollution controls than the States, there is substantial authority in the Act directing that the States, *and not the Federal government*, establish more restrictive requirements if necessary. Section 116 of the Act, as discussed *infra*, is devoted expressly to preserving the States' authority. These regulations unlawfully dilute the States' authority by allowing Federal land managers and Indian governing bodies to dictate the limits of air pollution within State geographical boundaries and, consequently, the growth and land uses well beyond those lands over which they have no jurisdiction. This obvious abrogation of State authority is contrary to the express mandates of the Act and for this reason, these regulations should be overturned.

Indian Reservation in Montana as a Class I area at the request of the Northern Cheyenne Tribal Council. This proposal recognizes that "facilities located near the reservation would violate the Class I increment within reservation borders." 42 Fed. Reg. 21819 (April 29, 1977)

[95]R. 9, *Technical Support Document, United States Environmental Protection Agency Regulations for Prevention of Significant Deterioration of Air Quality*, 19 (January, 1975); 38 Fed. Reg. 18986, 18993 (July 16, 1973) (A. 124a): ". . . It is anticipated that Zone I would normally be applied to those ultraclean areas such as national and state forests and parks, and other recreational areas in which it is desired to maintain essentially no deterioration of air quality."; 39 Fed. Reg. 42510 (Dec. 5, 1974) (A. 210a): "[T]here are some areas, such as national parks, where any deterioration would probably be viewed as significant."

CONCLUSION

For the foregoing reasons, petitioners request that the judgment of the Court below be reversed and that EPA's regulations for prevention of significant air quality deterioration be vacated as unlawful and unauthorized by the Clean Air Act.

Petitioners further request that, if the Court determines that these regulations are authorized under the Act, the provisions of these regulations conferring authority to Federal land managers and Indian governing bodies for the redesignation of certain lands be set aside as an unlawful abrogation of State authority under the Clean Air Act.

Respectfully submitted,

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ADDENDUM

RELEVANT PORTIONS OF THE CLEAN AIR ACT

Findings and Purposes

Sec. 101(a) The Congress finds

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, state, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

Air Quality Criteria and Control Techniques

Sec. 108.(a)(1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after the date of enactment of the Clean Air Amendments of 1970 publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before the date of enactment of the Clean Air Amendments of 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

(b)(1) Simultaneously with the issuance of criteria under subsection (a), the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate

air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to subsection (a) (1), which shall be comprised of technically qualified individuals, representatives of State and local governments, industry, and the academic community. Each such committee shall submit as appropriate, to the Administrator information related to that required by paragraph (1).

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

National Ambient Air Quality Standards

Sec. 109. (a) (1) The Administrator—

(A) within 30 days after the date of enactment of the Clean Air Amendments of 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date of enactment; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days

after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after the date of enactment of the Clean Air Amendments of 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient aid quality standard prescribed under subsection (a) shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

Implementation Plans

Sec. 110. (a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under Section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall

adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenace, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or any portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (c)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes privision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and anlyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not interfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standards or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(23) (A) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of

paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this Act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources) and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

[PL 93-319, June 24, 1974]

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment of maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed.

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsecton (a) (2) (II).

If such State held no public association with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

(2) (A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required this section to achieve and maintain

national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations, consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

[PL 93-319, June 24, 1974]

(d) For purposes of this Act, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements a national primary or secondary ambient air quality standard in a State.

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementating a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) for not more than

two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirements before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare,

then the Administrator shall grant a postponement of such requirement.

(2)(A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearings, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any interested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition the court shall have jurisdiction to affirm, or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if based upon fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 307(a) (relating to subpoenas) shall be applicable to any proceding under this subsection.

Standards of Performance for New Stationary Sources

Sec. 111. (a) For purposes of this section:

(1) The term 'standard of performance' means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the applicaton of the best system of emission reduction which (taking into account the cost of achieving such reduction) the Administrator determines has been adequately demonstrated.

(2) The term 'new source' means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term 'stationary source' means any building, structure, facility, or installation which emits or may emit any air pollutant.

(4) The term 'modification' means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term 'owner or operator' means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term 'existing source' means any stationary source other than a new source.

(b) (1) (A) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if he determines it may contribute significantly to air pollution which causes or contributes to the endangerment of public health or welfare.

(B) Within 120 days after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within

such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within 90 days after such publication, such standards with such modifications as he deems appropriate. The Administrator may, from time to time, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance or revisions thereof shall become effective upon promulgation.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purposes of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(c) (1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this Act to implement and enforce such standards (except with respect to new sources owned or operated by the United States).

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 110 under which each State shall submit to the Administrator a plan which (A) establishes emission standards for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 108(a) or 112(b) (1) (A) but (ii) to which a standard of performance

under subsection (b) would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such emission standards.

(2) The Administrator shall have the same authority.

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 110(c) in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 113 and 114 with respect to an implementation plan.

(e) After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

Retention of State Authority

Sec. 116. Except as otherwise provided in sections 119(c), (e) and (f), 209.211(c)(4), and 233 (preempting certain State regulation of moving sources) nothing in this Act shall preclude or deny the right of any state or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementaton plan or under section 111 or 112, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

Definitions

Sec. 302. When used in this Act—

(a) The term 'Administrator' means the Administrator of the Environmental Protection Agency.

(b) The term 'air pollution control agency' means any of the following:

(1) A single State agency designated by the Governor of that State as the official State air pollution control agency for purposes of this Act;

(2) An agency established by two or more States and having substantial powers or duties pertaining to the prevention and control of air pollution;

(3) A city, county, or other local government health authority, or, in the case of any city, county, or other local government in which there is an agency other than the health authority charged with responsibility for enforcing ordinances or laws relating to the prevention and control of air pollution, such other agency; or

(4) An agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(c) The term 'interstate air pollution control agency' means—

(1) an air pollution control agency established by two or more States, or

(2) an air pollution control agency of two or more municipalities located in different States.

(d) The term 'State' means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

(e) The term 'person' includes an individual, corporation, partnership, association, State, municipality, and political subdivision of a State.

(f) The term 'municipality' means a city, town, borough, county, parish, district or other public body created by or pursuant to State law.

(g) The term 'air pollutant' means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation,

manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being.